TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 304.

[redacted] PLAINTIFF IN ERROR,

vs.

[redacted] JOHN D. ARBUCKLE, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED [redacted]

(27,148)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 394.

FORT SMITH LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS EX REL. JOHN D. ARBUCKLE, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print.
Record from Chancery Court of Sebastian County, Ark.....	1	1
Caption	1	1
Complaint	2	1
Exhibit "A"—Statement.....	10	5
Exhibit "B"—Statement.....	11	6
Answer	12	6
Demurrer to answer.....	17	8
Order overruling demurrer to answer.....	18	9
Mandate	19	9
Supplemental complaint.....	22	11
Record entry: Decree.....	24	12
Agreed statement of facts.....	25	13
Exhibit A—Statement.....	32	16
Exhibit B—Statement.....	32	17
Fee bill.....	34	17

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	Original.	Print.
Clerk's certificate	34	17
Filing in Supreme Court	35	18
Record entries: Orders as to filing briefs; submission	36	18
Decree	37	19
Opinion	38	19
Opinion of October 15, 1917	46	23
Certificate of clerk	51	25
Assignment of errors	52	26
Petition for writ of error and allowance	54	27
Bond on writ of error	58	30
Writ of error	60	31
Certificate of lodgment	62	32
Citation and service	63	33
Return to writ of error	64	33

1 Pleas before Hon. J. V. Bourland, Judge of the Tenth Chancery District of Arkansas, of which the Fort Smith District of Sebastian County, Arkansas, Forms a Component Part, Had and Done in an Action Between—

STATE OF ARKANSAS Ex Rel. Attorney General

vs.

FORT SMITH LUMBER COMPANY.

Chancery Proceedings.

Wherein Judgment was Rendered on the 4th Day of Jany., 1919.

Appearances:

Geo. Vaughan, for Plaintiff.
Hill, Fitzhugh & Brizzolara, for defendant.

2 In the Sebastian Chancery Court.

STATE OF ARKANSAS ex Rel. WALLACE DAVIS, Attorney General, Plaintiff,

vs.

FORT SMITH LUMBER COMPANY, Defendant.

Complaint.

The State of Arkansas, on the relation of Wallace Davis, her Attorney General, and by George Vaughan, Frank Pace and T. M. Seawel, her attorneys by special employment, complains of the defendant, the Fort Smith Lumber Company, and for her cause of action alleges:

(1) That the defendant, the Fort Smith Lumber Company, is a corporation organized under and by virtue of the laws of the State of Arkansas on December 1, 1896. That since said date it has continuously operated its business in said State, having a domicile at Fort Smith in Sebastian County, but its office and principal place of business in the town of Plainview in Yell County, Arkansas. That the defendant is now and for the years hereinafter mentioned has been continuously engaged in the business of operating saw mills, plaining mills, a commissary, buying and holding timber and timber lands, and in manufacturing, buying and selling lumber and in disposing of the products thereof. Also, for the years hereinafter mentioned the defendant corporation has engaged in the business of buying, selling and dealing in real estate and in owning, buying,

selling and dealing in stocks and securities of other corpo-
3 rations.

(2) That the property of defendant corporation consists of its capital stock represented by and invested in real property and personal property, all in the State of Arkansas, including lands situate in Scott, Yell, Montgomery, Logan, Perry and Faulkner Counties, and in logs, manufactured lumber and other mill products, tools, teams, livestock, machinery, choses in action, bills receivable, book accounts, bank accounts, cash, stocks and bonds in other corporations and other tangible and intangible assets.

(3) That the defendant corporation was required under the statutes of Arkansas to return annually for taxation all of its property of the several classes above enumerated for the several years 1897 to 1915 inclusive; that in making such return of its property for taxation for said years the defendant was also required by law to make out and deliver to the assessor of Sebastian County, where the Company was legally domiciled, a sworn statement of its capital stock for the purpose of taxation.

That notwithstanding said requirement of law, the defendant Company for each and all of the years 1906 to 1915 inclusive failed, omitted and neglected to make out and deliver such sworn statements and wholly failed, omitted and neglected to return for taxation its capital stock in any sum whatever.

4 That the only taxes paid by the defendant upon its property were those upon the specific assessments of certain real estate in the several counties aforesaid, and upon the specific assessments of certain tangible property situate in the Counties of Scott and Yell, and certain nominal and inadequate assessments under the head of "Moneys and Credits," in the County of Sebastian for the years 1910, 1911, 1912, 1914 and 1915.

The relator is not advised as to the total amount of general taxes so paid by defendant upon real estate, tangible personal property and moneys and credits in the several counties aforesaid, but alleges from information and belief that for the year 1914 the aggregate amount of such taxes does not exceed $4,500, which amount, together with the aggregate amount of such taxes so paid by defendant for the other years hereinabove mentioned, the defendant is entitled to have credited upon the true aggregate amount of taxes lawfully accrued for said years, judgment for which is sought by this Complaint.

(4) That on the first day of June, 1906, defendant corporation was the owner of 2600 shares of the capital stock of the Central Railway Co. of Arkansas, a corporation organized under the laws of Arkansas, of the par and actual value of $260,000, and $260,000 worth of the defendant's own capital stock was so invested and employed in the purchase and ownership of said Railway Company's shares. That notwithstanding its ownership of said shares of railway stock of the value aforesaid, the defendant failed to turn in for tax-
5 ation a statement or memorandum of such stocks and the value thereof was not reckoned in defendant's assessment for said year of 1906 and was not assessed to it, whereby the defendant

corporation escaped the assessment of its capital stock to the extent of its said holdings in the said railway company.

That on the first day of June, 1907, and on the first day of June each succeeding year thereafter up to and including the year 1915, the defendant Company remained the owner of the said shares of stock in the Central Railway Company of Arkansas of the said value of, to-wit: $260,000, which said stock holdings represented an investment of a portion of the defendant's own capital stock and should have entered into its assessment for taxation for the said years 1907 to 1915 inclusive. But relator alleges that the said stock investment was not only omitted, but was not directly or indirectly considered or reckoned in the computation of the value of defendant's capital stock and the assessment thereof for taxation for general purposes for each of the said years, whereby, defendant wholly escaped the payment of its just and legal taxes thereon amounting in value to $260,000 for each of said years.

Relator, therefore, alleges that defendant corporation has escaped the payment of its just and legal taxes upon that portion of its capital stock invested in the stock of the Central Railway Company of Arkansas of the par value of $260,000 for each year from 1906
6 to 1915 inclusive, aggregating in value for the said ten years $2,600,000.

That the amount of taxes which have accrued thereon for the respective years is set forth in a tabular statement attached hereto and marked "Exhibit A."

(5) Relator further alleges that on the first day of June, 1910, defendant corporation was the owner of 2470 shares of the capital stock of the Choctaw Investment Company, a corporation organized under the laws of Arkansas, of the par value of $25 per share, but of the actual value of $30 per share, amounting to $74,100; and on the first day of June, 1911, the defendant corporation was the owner of 3480 shares of the capital stock of said Choctaw Investment Company of the actual value of $30 per share*m* amounting to $104,400; and that on the first day of June, 1912, defendant corporation remained the owner of 3480 shares of the capital stock of the said Choctaw Investment Company of the actual value of $50 per share amounting to $174,000; and that on the first day of June, 1913, the defendant corporation remained the owner of the 3480 shares of the capital stock of said Choctaw Investment Company of the actual value of $50 per share, amounting to $174,000; and that on the first day of June, 1914, the defendant corporation was the owner of 3996 shares of the capital stock of said Choctaw Investment Company, now of the actual value of more than $52 per share, amounting to $210,000; and that on the first day of June, 1915, the defendant corporation remained the owner of 3996 shares of the capital
7 stock of said Choctaw Investment Company, now of the actual value of more than $140 per share, amounting to $572,000.

That notwithstanding the defendant's ownership of the shares of the capital stock in the said Choctaw Investment Company as next hereinabove alleged for the several years of 1910 to 1915 inclusive, it did not return for taxation in Arkansas that portion of its own

capital stock so held and invested, whereby the defendant corporation escaped the payment of taxes upon its capital stock for the several years in the amounts above named, aggregating for said six years a value of $1,400,000. That defendant's own capital stock was invested and employed in the purchase and ownership of said shares of Investment Company's stock to the actual amount of its said holdings on the respective dates aforesaid.

That the amount of taxes which have accrued thereon for the respective years is set forth in a tabular statement attached hereto and marked "Exhibit B."

(6) That in stating the amount of back taxes herein alleged to be due, the several valuations of the capital stock aforesaid should be stated annually for the years 1906 to 1915 inclusive and should be reduced from full cash values to such proportion thereof as the assessed valuation of other property in said County of Sebastian for the respective years bears to its true value, and this proportion, relator is informed, was an average of 50%, and relator alleges that the total tax rates for the respective years of 1906 to 1915 inclusive for
8 State, county, school district and city taxes in the City of Fort Smith, where defendant's capital stock had its situs for taxation, was as follows:

1906	23	Mills
1907	24.75	"
1908	24.25	"
1909	23.25	"
1910	24.75	"
1911	23.875	"
1912	25.875	"
1913	25.375	"
1914	25.875	"
1915	25.875	"

(7) That the legal situs for the taxation of defendant's capital stock during all the years aforesaid was and is the City of Fort Smith in the County of Sebastian, and that general taxes have accrued in Arkansas to the State of Arkansas, to Sebastian County, to the City of Fort Smith, and to the special school district of Fort Smith upon that portion of the capital stock wholly omitted from assessment and taxation, as hereinabove set out, and particularly upon that portion of defendant's capital stock represented by and invested in the shares of the capital stock *represented and invested in the shares of the* capital stock of the Central Railway Company of Arkansas and of the Choctaw Investment Company, respectively, in the following amounts, to-wit: $48,831.87.

(8) Relator alleges and is satisfied from his own investigation and it has been made to appear to him by the statement in writing of a reputable taxpayer of the State that in consequence of the
9 failure to assess and levy taxes upon a certain portion of defendant's property having its legal situs in Sebastian County, as hereinabove set out, and because of the pretended assessment and

levy of taxes upon a basis of valuation other than the true valuation in money of said property, viz: By a total omission of any consideration or appraisement of the capital stock of said company and because of an inadequate and insufficient valuation and assessment of defendant's capital stock and an under-valuation thereof, and by the total omission to include in the valuation of said capital stock the defendant's stockholdings in the Central Railway of Arkansas and in the Choctaw Investment Company overdue and unpaid taxes owing by the defendant to the State of Arkansas, and to its political subdivisions, as hereinabove set out; that said taxes are due and chargeable upon the capital stock of said corporation, whose domicile and situs for taxation is in the said City of Fort Smith; and that this suit is authorized by Kirby's Digest of the statutes of Arkansas, Sections 7204 to 7213 inclusive, as amended by Act of May 20, 1911, and Act of March 12, 1913.

The premises considered, relator prays for judgment against the defendant, the Fort Smith Lumber Company, in the sum of $48,831.87; that upon a final hearing of this cause the Court determine the amount thereof due the City, County, and school district, respectively, and that same be declared a lien upon the said capital stock in Sebastian County; and that if the decree be not paid within three months from the rendition thereof, the capital stock of defendant, or so much thereof as necessary, be sold for the payment of such decree and judgment and for all other proper and equitable relief.

WALLACE DAVIS,
Attorney General.
GEO. VAUGHAN,
FRANK PACE,
T. M. SEAWEL,
Special Counsel.

"EXHIBIT A."

Stockholdings of Defendant in Central Railway Company of Arkansas.

Year.	Value stock held by deft.	Assessable value.	Rate of tax.	Amt. accrued taxes.
1906	$260,000	$130,000	.023	$2,990.00
1907	260,000	130,000	.02475	3,217.50
1908	260,000	130,000	.02425	3,152.50
1909	260,000	130,000	.02325	3,022.50
1910	260,000	130,000	.02475	3,217.50
1911	260,000	130,000	.023875	3,103.75
1912	260,000	130,000	.025875	3,363.75
1913	260,000	130,000	.025375	3,298.75
1914	260,000	130,000	.025875	3,363.75
1915	260,000	130,000	.025875	3,363.75
Total accrued taxes				$32,093.75

11 "EXHIBIT B."

Stockholdings of Defendant in Choctaw Investment Company.

Year.	Value of stock held by deft.	Assessable value.	Rate of tax.	Amt. accrued taxes.
1910	$74,100	$37,050	.02475	$915.98
1911	104,400	52,200	.023875	1,246.27
1912	174,000	87,000	.025875	2,251.12
1913	174,000	87,000	.025375	2,207.62
1914	210,000	105,000	.025875	2,716.87
1915	572,000	286,000	.025875	7,400.25
Total accrued taxes.....				$16,738.12

Endorsed on back: "Filed this 20th day of May, 1916. R. A. Harper, Clerk, by S. A. Lynch, D. C."

12 In the Sebastian Chancery Court.

STATE OF ARKANSAS ex rel. WALLACE DAVIS, Attorney General
Plaintiff,

vs.

FORT SMITH LUMBER COMPANY, Defendant.

Answer.

Comes the defendant, Fort Smith Lumber Company, in answer *un*to the complaint herein, and says:

That it has for each of the years mentioned in the complaint made due and proper return of its property for taxation and has paid taxes upon all of its property as required by law and in equal proportion to taxes paid by other owners of property. All statements in the complaint that defendant has not made proper return and has not been properly assessed are not true and are specifically denied; and alleges that each year it made out its assessment as required by Section 6936, Kirby's Digest and Amendatory Act.

That it is true that during the years named the defendant was the owner of certain shares of the capital stock of the Central Railway of Arkansas; the amount of shares owned by it are not accurately stated in the complaint; that the property of the Central Railway of Arkansas has each year been assessed as required by the laws of the State of Arkansas by the Tax Commission, and prior to the creation of the Tax Commission, by the Board composed of
13 State officers delegated with said duty; that the Central Railway of Arkansas is a railroad corporation and is assessed as such and has for each of the years mentioned in the complaint paid its full quota of taxes; that the capital stock, owned by the defendant, of the Central Railway of Arkansas has not been separately assessed, because the same would be double taxation upon the property of the Central Railway Company of Arkansas, or double taxation upon the owners of said stock, if it were required to be so assessed and taxed;

that it has been assessed and taxed in strict accordance with law and it has been assessed and paid upon a basis equal to that of all other property in the State of Arkansas, to-wit: on a basis of fifty per cent of its true value, which is in excess of the average amount of assessment against the property in the State; which assessment is equal or in excess of the value of the corporate stock on a 50% basis; that to require this defendant to pay upon the stock owned by it would be double taxation contrary to the Constitution of the State of Arkansas, contrary to the Fourteenth Amendment of the Constitution of the United States and violative of the taxing statutes of the State of Arkansas.

The defendant states that it is true that it has until recently owned shares of the capital stock of the Choctaw Investment Company, which was an Arkansas corporation, but which has now been dissolved; that the amount of its ownership of said shares is not accurately stated in the complaint, nor the value thereof, but
14 it has during the years mentioned owned a substantial amount of the stock of the Choctaw Investment Company; that all of the assets of the Choctaw Investment Company consisted of timber lands and that all of said lands were assessed at a value equal to, if not in excess of, the assessment of all other lands similarly situated, and the taxes have for each year mentioned in the complaint been fully paid upon the assessment made upon the assets of said Choctaw Investment Company; that most, if not all, of the assessments against the Choctaw Investment Company were fixed by the County courts of the counties wherein the lands were situated, on appeal from the Boards of Equalization of said counties; that the defendant has not returned as assessable the corporation stocks owned by it in the Choctaw Investment Company, because the assets represented by said investment has been taxed as real estate and paid upon as real estate, and to tax the same again in the form of corporate stock would be double taxation contrary to the Constitution of Arkansas, the Fourteenth Amendment of the Constitution of the United States and violative of the taxing statutes of the State of Arkansas.

That it is not true that the defendant's capital stock was invested and employed in the purchase and ownership of shares of stock in the Central Railway Company of Arkansas and the Choctaw Investment Company, and the defendant states the truth to be that the capital stock of the defendant, which amounted to $60,000.00 was paid in long before the acquisition of any of said stock, and
15 was invested in timber, timber lands, saw mills and other property, and that the shares of stock owned by the defendant in the Central Railway of Arkansas and in the Choctaw Investment Company were acquired largely on the personal credit of the stockholders of the defendant company and were paid for principally by the stockholders and their payments refunded from the earnings of this defendant company; that it is not true that any part of the capital stock of the defendant is invested in the shares of the Central Railway of Arkansas or of the Choctaw Investment Company; that the Choctaw Investment Co., the Central Ry. of Arkansas and the

Fort Smith Lumber Co., are each Arkansas corporations and all the assets of each one is in the State of Arkansas.

The defendant further alleges that the Act of the General Assembly under which the plaintiff is proceeding is violative of the Constitution of Arkansas and the Constitution of the United States in that it discriminates against corporations as such in providing for collection of back taxes against them when in similar circumstances back taxes could not be collected from individuals, and is therefore a denial of the equal protection of the laws to this defendant as a corporation.

The defendant further alleges that under a proper construction of the taxing system of the State of Arkansas it is not liable to taxation on capital stock which it owns in other corporations where such other corporations have been assessed and fully paid taxes on all of their assets, and if the laws of Arkansas are construed to thus re-
16 quire the defendant to pay on stock owned in other corporations, in addition to paying taxes on all the assets of such other corporation-, the said laws so construed would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that there would be an arbitrary classification of property owned by a corporation, while such construction would not apply if an individual owned said stock under like circumstances, and the defendant would not have equal protection of the laws and its property would be taken without due process.

That the defendant further pleads three years statute of limitations against all the claims except that of the State itself.

HILL, FITZHUGH & BRIZZOLARA,
Attorneys for Defendant.

Endorsed on back: "Filed June 23rd, 1916. R. A. Harper, Clerk, by John S. Wren, D. C."

17 In the Sebastian Chancery Court.

STATE OF ARKANSAS ex Rel. WALLACE DAVIS, Attorney General, Plaintiff,

vs.

FORT SMITH LUMBER COMPANY, Defendant.

Demurrer to Answer.

The plaintiff, upon relation of her Attorney General, demurs to the answer of the defendant and says:

The facts stated in the answer are not sufficient to constitute a defense.

Wherefore, plaintiff prays judgment, etc.

WALLACE DAVIS,
Attorney General.
GEO. VAUGHAN,
Special Counsel.

Endorsed on Back: "Filed this 26th day of Mch., 1917. R. A. Harper, Clerk, by S. A. Lynch, D. C.

18 *Record Entry.*

October, 1916, Term.

(Caption Omitted.)

March 26, 1917.

Comes on this cause to be heard on the complaint and the answer and the general demurrer of the plaintiff to the answer, the plaintiff appearing by George Vaughan, Special Counsel, and the defendant appearing by Hill, Fitzhugh & Brizzolara, its counsel.

The Court, after hearing argument of counsel and considering the allegations of the complaint and answer, doth overrule the demurrer to the answer, and holds that said answer sets forth a defense to the complaint.

Whereupon, the State elected to stand upon the demurrer and declined to plead further, and it is considered, ordered, adjudged and decreed by the Court that the complaint, be, and is hereby dismissed for the want of equity, and that the defendant be discharged and recover its costs, to which finding and ruling of the Court the plaintiff at the time excepted, and prayed and was granted an appeal to the Supreme Court.

(P.)

19 *Mandate.*

Reversals Chancery Districts.

STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 28th day, being the fourth Monday of May, A. D. 1917, amongst others, were the following proceedings, to-wit: On the 15th day of October, A. D. 1917, a day of said term:

No. —.

THE STATE OF ARKANSAS ex Rel. WALLACE DAVIS, Attorney General, Appellant,

vs.

FORT SMITH LUMBER COMPANY, Appellee.

Appeal from Sebastian Chancery Court, Fort Smith District.

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian county, Fort Smith District, and was

argued by solicitors; on consideration whereof it is the opinion of the Court that there is error in the proceedings and decree of said chancery court in this cause, in this: The Court erred in overruling the demurrer to the defendant's answer.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered, be, and the same
20 is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

In testimony, that the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, W. P. Sadler, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Little Rock, this 23rd day of November, A. D. 1917.

[SEAL.] W. P. SADLER, *Clerk*,
By J. H. CAMPBELL, *D. C.*

(Opinion omitted.)

Statement of Judgment and Costs.

STATE OF ARKANSAS, *ss:*

In the Supreme Court.

No. —.

STATE OF ARKANSAS ex Rel. WALLACE DAVIS, Atty. Genl., Appellant,

vs.

FORT SMITH LUMBER CO., Appellee.

Appeal from Sebastian Chancery Court.

Judgment Reversed.
Interest from —— —, ——.
Damages, —.

Costs in Supreme Court:	Adv. Clk. Due	$11.50
"	Transcript	5.00
21		
"	Appellant's brief	15.00
Costs in —— Court		....

STATE OF ARKANSAS:

In the Supreme Court.

I, W. P. Sadler, Clerk of the Supreme Court, do hereby certify that the above statement is correct.

Attest with Seal:

[SEAL.]

W. P. SADLER, *Clerk*,
By J. H. CAMPBELL, *D. C.*

Mandate endorsed on back: "Filed this 24th day of November, 1917. R. A. Harper, Clerk, by S. A. Lynch, D. C."

22 *Supplemental Complaint.*

In the Sebastian Chancery Court.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, Plaintiff,

vs.

FORT SMITH LUMBER COMPANY, Defendant.

The State of Arkansas on the relation of her Attorney General, now John D. Arbuckle, for her additional and supplemental complaint against defendant alleges:

(1) That since the filing of the original complaint on May 20, 1916, taxes have accrued upon the capital stock of defendant, represented by its investment in the subsidiary corporations, Central Railway Company of Arkansas and Choctaw Investment Company, for the additional years 1916, 1917 and 1918, as follows:

Stockholdings in Central Railway Company of Arkansas.

Year.	Value of stock held by defendant.	Assessable value.	Rate of tax.	Amount of accrued taxes.
1916	$260,000	$130,000	.026375	$3,428.75
1917	260,000	130,000	.032	4,160.00
				$7,588.75

And relator alleges that defendant corporation escaped the payment of its just taxes upon that portion of its capital stock invested in the stock of the Central Railway Company of Arkansas in the amounts as hereinabove alleged.

Wherefore, relator prays judgment for the increased sum of $7,588.75.

JOHN D. ARBUCKLE,
Attorney General.
GEO. VAUGHAN,
Special Counsel.
T. M. SEAWEL,
Special Counsel.
FRANK PACE,
Special Counsel.

Endorsed on back: "Filed in open court, December 21, 1918. R. A. Harper, Clerk, by S. A. Lynch, D. C."

Record Entries.

October, 1918, Term.

(Caption Omitted.)

December 21, 1918.

Comes plaintiff and files supplemental complaint herein.

No. 3725.

STATE OF ARKANSAS ex Rel. ATTORNEY GENERAL, Plaintiff,

vs.

FORT SMITH LUMBER COMPANY, Defendant.

Decree.

Comes on to be heard this cause on the mandate of the Supreme Court heretofore filed, and the plaintiff appeared by Hill, Fitzhugh & Brizzolara, its counsel. The plaintiff filed an amendment to the complaint, the purport of which was to claim additional back taxes for the years elapsing since the filing of the complaint, to-wit: for the years 1916, 1917 and 1918. The Court, pursuant to the mandate of the Supreme Court, sustains the demurrer of the complaint to the defendant's answer, and the defendant excepted to the ruling thereof and elected to stand upon its answer. The Court, by the consent of the parties, heard the cause on the complaint, amendment to the complaint and the agreed statement of facts, it being expressly stipulated that no default judgment be taken on account of the refusal of the defendant to file an amended answer. The court ordered the agreed statement of facts to be inserted in the decree as part of this record, and said agreed statement of facts was all the evidence introduced, and is as follows, to-wit:

Agreed Statement of Facts.

It is stipulated that the evidence, if introduced would show the following facts, and in lieu of introducing the testimony the parties hereto have agreed that the following are the facts relative to the matters and things set forth in the pleadings herein:

1. That the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company were each, for the years mentioned in the complaint, corporations existing and doing business in the State of Arkansas, and each was duly organized under the laws of Arkansas, the Fort Smith Lumber Company and Choctaw Investment Company being organized under Section 837 and following sections of Kirby's Digest providing for the organization for manufacturing and other business, and the Central Railway of Arkansas being organized under Chapter 133 of Kirby's Digest providing for the incorporation of railroad companies. That the Fort Smith Lumber Company was authorized by its articles of incorporation, among other powers, "to own, buy, sell and deal in real estate and other property; to engage in the mercantile business and conduct commissaries; to own, buy, sell and deal in stocks, bonds and securities of other corporations." That all of the assets of the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company of every kind, nature and description were during the years mentioned in the complaint situated in the
26 State of Arkansas, and that none of said corporations owned any assets outside of the State of Arkansas.

2. That the Fort Smith Lumber Company owned 260 shares of stock in the Central Railway of Arkansas during the years hereinafter mentioned and prior to 1909 the Central Railway of Arkansas made annual report to the State Board of Railway Commissioners, and said State Board of Railway Commissioners each year made an assessment of its property until 1909, when the Tax Commission was created, and thereafter said Railway Company made its report to the Tax Commission and the Tax Commission each year made the assessment of the railroad property; that each year hereinafter mentioned the Central Railway of Arkansas made its annual report, pursuant to statute, to said taxing body. That each year the Central Railway of Arkansas was assessed fifty per cent of the true market value of all of its assets, real, personal and mixed, and including tangible and intangible property and that said assessment of fifty per cent of the true market value of its assets was also fifty per cent of the true market value of the stock of said Central Railway of Arkansas. That all other railroad property in the State of Arkansas was assessed during each of the years on the basis of fifty per cent of the true market value of all of its assets, real, personal and mixed, including tangible and intangible property; That the Railway Company paid each year the full amount of the assessment against it. That the Central Railway of Arkansas paid no other taxes
27 than that assessed against it by the Board of Railroad Commissioners or Tax Commission, the same being an assessment

upon all of the property of whatsoever kind of the Railroad Company.

3. That the Fort Smith Lumber Company owned stock in the Choctaw Investment Company in different amounts during the several years hereinafter mentioned; that all of the assets of the Choctaw Investment Company consisted of timber lands, and it owned no personal property or any other property than said timber lands; That said lands were assessed by the assessors in the various counties in which the same were situated, and at times the assessment was finally determined by the county courts on appeal from the Board of Equalization; That the lands of the Choctaw Investment Company were each year assessed at fifty per cent of their true market value, and the lands in the counties wherein said lands were situated and throughout the State were assessed on a basis of fifty per cent of their true market value; That the assessment of fifty per cent of the true market value of said lands was also fifty per cent of the value of the stock of the Choctaw Investment Company: That the Choctaw Investment Company paid no other taxes than that assessed on said real estate, the same being all of its property.

4. That the Fort Smith Lumber Company each year made its return as required by Section 6936 of Kirby's Digest and amendatory act thereto; That it did not return for assessment the stock owned by it in the Central Railway of Arkansas or in the
28 Choctaw Investment Company, as all of the property of the Central Railway of Arkansas and of the Choctaw Investment Company was separately assessed. It made a full disclosure of its holding of the stock in the Central Railway of Arkansas and the Choctaw Investment Company to the taxing officials who made the assessment against the Fort Smith Lumber Company. Excepting the stock owned by the Fort Smith Lumber Company in the Central Railway of Arkansas and in the Choctaw Investment Company, the assets of the Fort Smith Lumber Company, real, personal and mixed, including tangible and intangible property, were for each of the years hereinafter mentioned assessed for fifty per cent of their true market value of the assets was also fifty per cent of the value of the stock of the Fort Smith Lumber Company, less the value of the stock owned by it in said Central Railway of Arkansas and Choctaw Investment Company. That all other property in the State of Arkansas of similar kind and similarly situated as the assets of the Fort Smith Lumber Company was assessed on a basis of fifty per cent of the true market value. That the Fort Smith Lumber Company each year, as hereinafter mentioned, paid the full amount of taxes assessed against it by the taxing authorities, which in some instances was fixed by the county court on appeal from the Board of Equalization.

5. That the true market value of the stock of the Central Railway of Arkansas owned by the Fort Smith Lumber Company during each of the following years was as follows, to-wit:

29

1907	$125,220.00
1908	125,220.00
1909	125,220.00
1910	125,220.00
1911	125,220.00
1912	130,706.00
1913	133,598.00
1914	153,290.00
1915	156,670.00
1916	182,930.00
1917	198,686.00
1918	198,686.00

That the true market value of the stock of the Choctaw Investment Company owned by the Fort Smith Lumber Company during each of the following years was as follows, to-wit:

1910	$74,100.00
1911	104,400.00
1912	174,000.00
1913	174,000.00
1914	210,000.00
1915	210,000.00

6. It is agreed that should the Court under the foregoing statement of facts hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Central Railway of Arkansas, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "A" hereto; and
30 that should the Court hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Choctaw Investment Company, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "B" hereto.

7. It is agreed that the foregoing facts are all the facts which are material for the determination of the issues herein.

Given under our hands this the 31st day of December, 1918.

GEO. VAUGHAN,
Attorney for Plaintiff.
HILL, FITZHUGH & BRIZZOLARA,
Attorneys for Defendant.

Endorsed: "Filed in open Court, Jan'y 4, 1919. S. A. Lynch, Clerk."

31 The Court finds that under the opinion of the Supreme Court and Mandate in this case it must find, contrary to its previous ruling herein on the same state of facts, that the Fort Smith Lumber Company is liable for taxes upon fifty per cent of the market value of the stock owned by it in the Central Railway of Arkansas

and in the Choctaw Investment Company for each of the years which said Fort Smith Lumber Company owned said stock respectively.

The Court further finds that for each of said years it holds the Fort Smith Lumber Company liable to pay taxes upon fifty per cent of the value of the stock owned by it in the Central Railway of Arkansas and the Choctaw Investment Company; that the Central Railway of Arkansas and the Choctaw Investment Company were duly assessed according to law and paid taxes upon fifty per cent of all their assets, real, personal and mixed, tangible and intangible, and that the said fifty per cent of the value of the assets of said corporation was also fifty per cent of the market value of the stock in said corporation respectively.

It is considered, ordered, adjudged and decreed by the Court that the State of Arkansas for the benefit of itself and its political subdivisions for which it sues, have and recover of and from the Fort Smith Lumber Company the following amount of taxes accruing to the plaintiff by reason of the holding of the stock of the Central Railway of Arkansas according to the following table, which is Exhibit "A" of the agreed statement of facts, to-wit:

32 EXHIBIT "A."

Year.	Value of stock.	Assessable value.	Tax rate.	Accrued taxes.	
1907	$125,220	$62,610	.02475	$1,549.59	
1908	125,220	62,610	.02425	1,518.29	
1909	125,220	62,610	.02325	1,455.68	
1910	125,220	62,610	.02475	1,549.59	
1911	125,220	62,610	.023875	1,494.81	
1912	130,706	65,353	.025875	1,691.00	
1913	133,598	66,799	.025375	1,586.47	
1914	153,290	76,645	.025875	1,983.19	
1915	156,670	78,335	.025875	2,026.92	
1916	182,930	91,465	.026375	2,412.39	
1917	198,686	99,343	.032	3,178.97	
1918	198,686	99,343	.032	3,178.97	
					$23,625.87

It is considered, ordered, adjudged and decreed by the Court that the State of Arkansas for the benefit of itself and its political subdivisions for which it sues, have and recover of and from the Fort Smith Lumber Company the following amount of taxes accruing to the plaintiff by reason of the holding of the stock of the Choctaw Investment Company according to the following table, which is Exhibit "B" of the agreed statement of facts, to-wit:

EXHIBIT "B."

Year.	Value of stock.	Assessable value.	Tax rate.	Accrued taxes.	
1910	$74,100	$37,050	.02475	$916.99	
33					
1911	104,400	52,200	.023875	1,246.27	
1912	174,000	87,000	.025875	2,251.12	
1913	174,000	87,000	.025375	2,207.62	
1914	210,000	105,000	.025875	2,716.87	
1915	210,000	105,000	.025875	2,716.87	
					$12,055.74
Total					$35,681.61

It is considered, ordered, adjudged and decreed by the Court that for all the matters and things alleged in the complaint the defendant, Fort Smith Lumber Company, is indebted to the State of Arkansas in the sum of $35,681.61, for back taxes as herein set forth, and that it is indebted in no other sum for any back taxes other than herein set forth to the date of entry of this decree, and that the State, for the uses hereinbefore mentioned, have and recover of and from the Fort Smith Lumber Company the said sum of $35,681.61, and all its costs herein laid out and expended, and that it may have execution therefor. To which finding of the Court fixing the liability on the Fort Smith Lumber Company as herein stated, and to the decree rendering judgment therefor, the defendant at the time excepted, and prayed and was granted an appeal to the Supreme Court.

(P.)

34 *Fee Bill.*

	Pltf.	Deft.
Clerk, ...	$6.65	$ .60
Sheriff, ...	.40	
Clerks, (this transcript)	.....	9.60
Supreme Court Costs:		
Clerk, ...	11.50	
Transcript, ...	5.00	
Appellant's Brief	15.00	
	$38.55	$10.20

STATE OF ARKANSAS,
County of Sebastian, ss:

I, S. A. Lynch, Clerk of the Chancery Court within and for the County and State aforesaid and for the Fort Smith District thereof, do hereby certify that the annexed and foregoing pages contain a true and correct transcript of all the papers and record entries in the case of State of Arkansas, Ex Rel: Atty. General, vs. Fort Smith

Lumber Company, as therein set forth, including the fee bill, wherein judgment was rendered on the 4th day of January, 1919, as the same appear on file and of record in my office at Fort Smith, Arkansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court on this 16th day of Jany *y.*, 1919.

[SEAL.] S. A. LYNCH,
Chancery Clerk.

35 Sebastian Chy., F. S. D.

No. 5649.

FORT SMITH LUMBER Co, Appellant,

vs.

STATE OF ARKANSAS ex Rel. THE ATTORNEY GENERAL, Appellee.

J. V. Bourland, Ch. \$—.

Transcript.

Filed Jan'y. 27, 1919.

W. P. SADLER, *Clk.*,
By J. H. CAMPBELL, *D. C.*

36 STATE OF ARKANSAS,
In the Supreme Court, ss:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday in November, A. D. 1918, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 7th day of April, 1919, a day of said term.

5649.

FORT SMITH LUMBER COMPANY, Appellant,

v.

THE STATE OF ARKANSAS ex Rel. THE ATTORNEY GENERAL, Appellee.

Appeal from Sebastian Chancery Court, Fort Smith District.

On motion, and for cause shown, the appellee is allowed by the Court until April 14th inst., in which to file his brief herein.

November Term, 1918.

(Caption Omitted.)

April 21, 1919.

On motion, and for cause shown, the appellant is allowed by the Court one week from date in which to file its reply brief herein.

37 November Term, 1918.

(Caption Omitted.)

April 28, 1919.

This cause being regularly called, come the parties thereto by their solicitors, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

November Term, 1918.

(Caption Omitted.)

May 5, 1919.

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian County, Fort Smith District, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court *court* in this cause rendered be, and the same is hereby in all things, affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellant all her costs in this Court in this cause expended, and have execution thereof.

Wood and Hart, JJ., dissent.

38 In the Supreme Court of Arkansas, May 5, 1919.

No. 206.

FORT SMITH LUMBER CO.

vs.

STATE ex Rel. ATTORNEY GENERAL.

Opinion.

SMITH, *J.*:

Upon the remand of the cause of State, ex rel. Attorney General v. Fort Smith Lumber Company, 131 Ark. 40, the parties prepared

the following agreed statement of facts upon which the cause was submitted.

"1. That the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company were each, for the years mentioned in the complaint, corporations existing and doing business in the State of Arkansas, and each was duly organized under the laws of Arkansas, the Fort Smith Lumber Company and Choctaw Investment Company being organized under Section 837 and following sections of Kirby's Digest providing for the organization of corporations for manufacturing and other business, and the Central Railway of Arkansas being organized under Chapter 133 of Kirby's Digest providing for the incorporation of railroad companies. That the Fort Smith Lumber Company was authorized by its articles of incorporation, among other powers, 'to own, buy, sell and deal in real estate and other property; to engage in the mercantile business and conduct commissaries; to own, buy, sell and deal in stocks, bonds and securities of other corporations.' That all of the assets of the Fort Smith Lumber Company, Central Railway of Arkansas
39 and the Choctaw Investment Company of every kind, nature and description were during the years mentioned in the complaint situated in the State of Arkansas, and that none of said corporations owned any assets outside of the State of Arkansas.

"2. That the Fort Smith Lumber Company owned 260 shares of stock in the Central Railway of Arkansas during the years hereinafter mentioned and prior to 1909 the Central Railway of Arkansas made annual report to the State Board of Railway Commissioners, and said State Board of Railway Commissioners each year made an assessment of its property until 1909, when the Tax Commission was created, and thereafter said Railway Company made its report to the Tax Commission and the Tax Commission each year made the assessment of the railroad property; That each year hereinafter mentioned the Central Railway of Arkansas made its annual report, pursuant to statute, to said taxing body That each year the Central Railway of Arkansas was assessed fifty per cent. of the true market value of all of its assets, real, personal and mixed, and including tangible and intangible property and that said assessment of fifty per cent. of the true market value of its assets was also fifty per cent. of the true market value of the stock of said Central Railway of Arkansas. That all other railroad property in the State of Arkansas was assessed during each of the years on the basis of fifty per cent. of the true market value of all of its assets, real, personal and mixed, in-
40 cluding tangible and intangible property; That the railroad company paid each year the full amount of the assessment against it. That the Central Railway of Arkansas paid no other taxes than that assessed against it be the Board of Railroad Commissioners or Tax Commission, the same being an assessment upon all of the property of whatsoever kind of the Railroad Company.

3. That the Fort Smith Lumber Company owned stosk in the Choctaw Investment Company in different amounts during the several years hereinafter mentioned; That all of the assets of the Choctaw Investment Company consisted of timber lands, and it owned

no personal property or any other property than said timber lands; That said lands were assessed by the assessors in the various counties in which the same were situated, and at the times the assessment was finally determined by the county courts on appeal from the Board of Equalization; That the lands of the Choctaw Investment Company were each year assessed at fifty per cent. of their true market value, and the lands in the counties wherein said lands were situated throughout the State were assessed on a basis of fifty per cent. of their true market value; That the assessment of fifty per cent. of the true market value of said lands was also fifty per cent. of the value of the stock of the Choctaw Investment Company; That the Choctaw Investment Company paid no other taxes than that assessed on said real estate, the same being all of its property.

"4. That the Fort Smith Lumber Company each year made
41 its return as required by Section 6936 of Kirby's Digest and amendatory act thereto; That it did not return for assessment the stock owned by it in the Central Railway of Arkansas or in the Choctaw Investment Company, as all of the property of the Central Railway Company and of the Choctaw Investment Company was separately assessed. It made a full disclosure of its holding of the stock in the Central Railway of Arkansas and the Choctaw Investment Company to the taxing officials who made the assessment against the Fort Smith Lumber Company. Excepting the stock owned by the Fort Smith Lumber Company in the Central Railway of Arkansas and in the Choctaw Investment Company, the assets of the Fort Smith Lumber Company, real, personal and mixed, including tangible and intangible property, were for each of the years hereinafter mentioned assessed for fifty per cent. of their true market value, and said fifty per cent. of the true market value of the assets was also fifty per cent. of the value of the stock of the Fort Smith Lumber Company, less the value of the stock owned by it in said Central Railway of Arkansas and Choctaw Investment Company. That all other property in the State of Arkansas of similar kind and similarly situated as the assets of the Fort Smith Lumber Company was assessed on a basis of fifty per cent. of the true market value. That the Fort Smith Lumber Company each year, as hereinafter mentioned, paid the full amount of taxes assessed against it by the taxing authorities, which in some instances was fixed by the county court on ap-
42 peal from the Board of Equalization."

Then follows a stipulation showing the market value of the stock of the Railway Company and of the Investment Company during the years covered by this suit.

"6. It is agreed that should the court under the foregoing statement of facts hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Central Railway of Arkansas, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "A" hereto; and that should the court hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Choctaw Investment Company, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "B" hereto.

(Exhibits "A" and "B" are not copied, as there is no controversy about the calculations there made.)

"7. It is agreed that the foregoing facts are all the facts which are material for the determination of the issues herein."

The Court found the appellant lumber company liable for the taxes set out in the exhibits and entered a decree accordingly, from which this appeal has been prosecuted.

On behalf of the State it is now insisted that no new issue is presented for our decision and that the opinion on the former appeal is the law of the present case. On the former appeal the case was decided on the pleadings; while here the issues are presented
43 in an agreed statement of facts. But we think no issue is now presented which was not involved in, and disposed of by, the opinion on the former appeal. In that opinion we there said: "It is alleged in the complaint that the said corporation failed to assess the whole of its capital stock for taxation, as required by statute, and deducted from the value of the capital stock, as assessed, amounts invested in shares of stock in certain other domestic corporations.

"The allegations are that the defendant owned shares of stock in the Central Railway Company, an Arkansas corporation, of the value of $260,000, and also owned shares of stock in the Choctaw Investment Company, another domestic corporation, of the value of $104,000, and that in assessing its property for taxation it deducted the value of all those shares of stock from its capital stock.

"The defendant denied in the answer that any of its property had escaped taxes for former years, but admitted that it owned shares of stock in the other corporations named, and alleged that those shares of stock were purchased with proceeds of the earnings of the corporation, not with the original capital stock, and that it has regularly assessed for taxation its original capital stock at par value, as well as its other property, except the shares of stock in the other corporations. It is admitted in the answer that the value of the shares of stock in other corporations *are* not assessed, but is deducted from the valuation of the capital stock of the corporation other than
44 its original capital stock."

And the identity of the issues appear- from the following statement in the former opinion:

"The pleadings in the case, therefore, present the question whether a domestic corporation, in returning its capital stock for taxation, may deduct investments of its surplus in shares of stock in other corporations in the State. The right to make such deduction is asserted under authority of the statute which provides that 'no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks joint stock companies or otherwise which (he) is required to list, any share or portion of the capital stock *of* property of any company or corporation which is required to list or return its capital and no property for taxation in this State.' Kirby's Digest, sec. 6902."

We there said that the question involved appeared to have been fully decided against the lumber company's contention in the case of Dallas County v. Home Fire In:. Co., 97 Ark. 254, and the further

discussion of the issues here involved would result only in a repetition of the argument there made.

As distinguishing this case from the former one it is pointed out that it now appears from the agreed statement of facts that the stock in the appellant lumber company had no intangible value inhering in it over the value of the property taxed and, therefore, the
45 full taxation of it included *e*very element of value and that to refuse to deduct the value of stocks owned by the lumber company results in twice taxing that much of the stock or property of the lumber company which was invested in corporations which were separately assessed and taxed. This, however, is the very point in issue; and while it is presented differently it is the question decided on the former appeal as appears from the following quotation from that opinion:

Of course, it would constitute double taxation, as was said in the Dallas County case, to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations."

The decree of the court below is, therefore, affirmed.

Justices Wood and Hart dissent.

46 In the Supreme Court of Arkansas, Oct. 15, 1917.

No. 157.

STATE OF ARKANSAS ex Rel. ATTORNEY GENERAL

vs.

FORT SMITH LUMBER CO.

Opinion.

McCULLOCH, *C. J.*:

This suit was instituted in the name of the State, ex rel. the Attorney General, against the Fort Smith Lumber Company, a domestic corporation, to recover taxes which escaped adequate assessment for former years. It is alleged in the complaint that the said corporation failed to assess the whole of its capital stock for taxation, as required by statute, and deducted from the value of the capital stock, as assessed, amounts invested in shares of stock in certain other domestic corporations.

The allegations are that the defendant owned shares of stock in the Central Railway Company, an Arkansas corporation, of the value of $260,000.00, and also owned shares of stock in the Choctaw Investment Company, another domestic corporation, of the value of $104,000.00, and that in assessing its property for taxation it deducted the value of all those shares of stock from its capital stock.

The defendant denied in the answer that any of its property had escaped taxes for former years, but admitted that it owned
47 shares of stock in the other corporations named, and alleged that those shares of stock were purchased with proceeds of the earnings of the corporation, not with the original capital stock, and that it has regularly assessed for taxation its original capital stock at par value, as well as its other property, except the shares of stock in the other corporations. It is admitted in the answer that the value of the shares of stock in other corporations is not assessed, but is deducted from the valuation of the capital stock of the corporation other than its original capital stock.

The pleadings in the case, therefore, present the question whether a domestic corporation, in returning its capital stock for taxation, may deduct investments of its surplus in shares of stock in other corporations in the State. The right to make such deduction is asserted under authority of the statute which provides that "no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise which (he) is required to list, any share or portion of the stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Kirby's Digest, sec. 2902.

The question involved seems to have been fully decided against defendant's contention in the case of Dallas County v. Home Fire Insurance Company, 97 Ark. 254, where it is said: "So, if one corporation purchases shares of stock in another corporation, it
48 does not pay taxes on the shares so purchased, for the corporation which issued the shares must pay the taxes on its own property; but it does not follow that the first corporation is not required to assess and pay taxes on its own capital stock because it has invested all or a part of it in the stock of another corporation. In such case the corporation differs from an individual, in that it has capital stock on which it must pay taxes and an individual has not. To hold otherwise would be to exempt the property of the first corporation from taxation, which it cannot be presumed that the Legislature intended to do, and which it has no power to do."

It is insisted that the decision just referred to applies only to assessments of the original capital stock of a corporation, and that the words "capital stock" as used in that decision meant only the par value of the aggregate shares of stock, not including earned surplus. In the recent case of State, ex rel., v. Bodcaw Lumber Company, we defined the term "capital stock" as used in the statute to mean "the aggregate value of the shares of stock in the hands of the shareholders," which would, of course, include the value augmented by the earned surplus. The two decisions must be considered together, and when that is done it is plain that they lead irresistably to the conclusion that defendant is wrong in its assertion of the right to deduct from its assessment of capital stock the value of the shares of stock in the other corporations.

We are unable to discover any reason for distinction in
49 refusing to allow this deduction from the earned surplus and from the par value of the capital stock, for our statute makes no provision for separate assessment of the par value of capital stock. The aggregate value is assessed and the value of tangible property in which the capital is invested is deducted, but the amount thus obtained is not reducible by the value of the investments in non-assessable property. That was decided by this court in the Bodcaw Lumber Company case, supra, and the same principle was announced in First National Bank of Batesville v. Board of Equalization of Independence County, 92 Ark. 335. Nor does this construction of the statute operate as a discrimination against a corporation and in favor of individual owners of shares of stock. The capital stock of a corporation has its own value. It is assessable as such for taxation, and the failure to deduct investments in shares of stock of other corporations does not constitute double taxation. The two elements of value are separate and distinct, for the shares of stock themselves are not assessed for taxes. Of course, it would constitute double taxation, as was said in the Dallas County case, to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations. An individual is not required to return, in his assessment, the value of the shares of stock in a corpo-
50 ration, and his investment in such shares of stock is, therefore, not directly taxed, but, as pointed out in the Dallas County case, a corporation has a separate assessable valuation in its capital stock which is not possessed by an individual, and it constitutes no discrimination against a corporation to fail to deduct the value of such shares of stock held in other corporations from the assessment of its capital stock.

The question of the right of corporations to hold shares in another corporation has been zealously argued by counsel on both sides, but we think it is unnecessary to pass upon that question, in view of our conclusion that it is the aggregate value of the capital stock of the corporation which is assessable, and it is unimportant whether it has been rightfully or wrongfully invested in shares of stock in other corporations.

We are of the opinion, therefore, that the learned chancellor erred in overruling the demurrer to the answer, and the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Wood and Hart, JJ., dissent.

51 Supreme Court, State of Arkansas, *ss:*

I, W. P. Sadler, clerk of said court, do hereby — that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Fort Smith Lumber Company, Appellant, vs. The State of Arkansas, ex rel. Attorney General, Appellee, and also the

opinion of the court rendered therein, together with the opinion rendered on October 15, 1917, between the same parties, which is referred to as "the law of the case," as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Little Rock, Arkansas, this May 28th, 1919.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

52 In the Supreme Court of the United States.

FORT SMITH LUMBER COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS ex Rel. ATTORNEY GENERAL, Defendant in Error.

Assignment of Errors.

Now comes Fort Smith Lumber Company, petitioner and plaintiff in error, by its attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with its petition for writ of error says:

That in the record and proceedings and in the rendering of the judgment and the decision of the Supreme Court of Arkansas in the above cause manifest error has intervened, to the prejudice of this petitioner and plaintiff in error, in this, to-wit:

First. The Court erred in not declaring Act 169 of the General Assembly of the State of Arkansas of 1913, under which this suit is prosecuted, to be void as creating an arbitrary classification of property owned by corporations and discriminating against corporation ownership of property contrary to the equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Second. The Court erred in construing the Constitution of the State of Arkansas and the taxing statutes of the State so as to authorize and require taxation upon the full value of the stock and assets of the Fort Smith Lumber Company without deducting therefrom the value of the stock owned by it in the Choctaw Investment Company and the Central Railway of Arkansas, which were separately assessed and taxed their full measure of taxation; and the Court in so construing the constitution and the statutes thereby made such taxation of Fort Smith Lumber Company, to the extent of the taxation upon the value of the stock of the Choctaw Investment Company and the Central Railway of Arkansas owned by it, double taxation, contrary to the equality and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in construing the Constitution and taxing statutes of Arkansas so as to authorize and require taxation upon the

full value of its capital stock and assets, including therein stock
53 owned by it in Choctaw Investment Company and Central Railway of Arkansas, upon which stock and assets of said Choctaw Investment Company and Central Railway of Arkansas there had been separate assessments and taxation as required by the laws of Arkansas; and that the construction thus placed upon the Constitution and taxing statutes rendered same an arbitrary classification of property owned by a corporation, which said construction did not apply to similar property owned by an individual, and that under said taxing statutes so construed the defendant corporation has not the equality of the laws and its property is taken without due process, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

By reason whereof, this petitioner and plaintiff in error prays that the decision of the Supreme Court of Arkansas may be reversed and justice done.

Dated this 19 day of May, 1919.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Petitioner and Plaintiff in Error.

Filed May 27, 1919.
W. P. SADLER, *Clk.*,
By J. H. CAMPBELL, *D. C.*

54 *Petition for Writ of Error.*

To the Honorable E. A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Comes the Fort Smith Lumber Company, the appellant in an action lately pending in this Court, wherein the State of Arkansas, ex rel. the Attorney General, was the appellee, and represents that on the 5th day of May, 1919, final judgment was entered by the Supreme Court of Arkansas, affirming the decree of the Sebastian Chancery Court, Fort Smith District, in a suit in equity wherein the State of Arkansas, ex rel. Attorney General, was plaintiff, and the Fort Smith Lumber Company was defendant, wherein judgment was rendered for the plaintiff in the sum of $35,681.61, together with interest and the costs in said courts; and that this is an action brought by the Attorney General on behalf of the State and its subordinate agencies under and pursuant to Act 169 of the Acts of the General Assembly of 1913, approved March 12, 1913; that the complaint alleges that the defendant, Fort Smith Lumber Company, owned a substantial amount of the capital stock in the Choctaw Investment Company and in the Central Railway of Arkansas, and that each of said three companies are corporations created and existing under and by virtue of the laws of the State of Arkansas; that taxation in Arkansas is upon a basis of fifty per cent of the market value of property; that the defendant, in assessing and paying taxes upon its capital stock and assets, deducted therefrom the value of

the stock which it owned in the Choctaw Investment Company and in the Central Railway of Arkansas, and paid taxes upon the residue of the value of its capital stock and assets on the basis of fifty per cent of the market value of the same; that Forth Smith Lumber Company answered the complaint and admitted owning a substantial amount of stock in the Choctaw Investment Company and the Central Railway of Arkansas, and admitted that it deducted the value of said stock from the value of the stock and assets of the Fort Smith Lumber Company in assessing and paying taxes upon the assets and stock of the Fort Smith Lumber Company, and that it did so on account of a separate assessment against both Choctaw Investment Company and the Central Railway of Arkansas,
55 which separate assessments were made pursuant to the laws of the State requiring the same to be made, and that the Choctaw Investment Company and the Central Railway of Arkansas paid taxes under such assessments upon fifty per cent of the value of the stock and assets of said Companies respectively, and that therefore the deduction of the value of the stock from the assessment and taxation of the Fort Smith Lumber Company was proper, and that said Fort Smith Lumber Company owed no back taxes upon the value of said stock owned by it; that said answer was met by a demurrer by plaintiff, and the Chancery Court overruled said demurrer and rendered judgment dismissing the complaint, and thereupon the plaintiff appealed to the Supreme Court of Arkansas, and said Court reversed said decision of the Chancery Court and remanded the case to the Chancery Court with directions to sustain said demurrer; that the decision of the Supreme Court was not a final decision under the rules of practice of the State of Arkansas; that thereafter, in the Chancery Court, the said demurrer was sustained by that Court and the case tried upon an agreed statement of facts, which was substantially the facts as above set forth. It was admitted in said trial that the Choctaw Investment Company and the Central Railway of Arkansas had each been separately assessed for taxation the full measure of taxation required by the State upon the market value of its assets and that the market value of its assets was the same value as the value of the stock in said corporation; and it was admitted that Fort Smith Lumber Company was assessed and paid full measure of taxation against its assets and stock, excluding from its assessment and taxation the value of the stock and assets of Choctaw Investment Company and Central Railway of Arkansas; and it was admitted that this action was to recover of the defendant taxation upon fifty per cent of the value of the stock so deducted from the assessment and taxation of the Fort Smith Lumber Company, notwithstanding the full measure of taxation of Choctaw Investment Company and Central Railway of Arkansas had been paid by said corporations separately; that the answer of the defendant in said action alleged that the said Act of 1913 was in violation of the Constitution of the United States in that it discriminated against corporations as such in providing for the collection of back taxes against them when in similar circumstances
56 back taxes could not be collected of individuals, and that it was therefore a denial of the equal protection of the laws to

the defendant corporation; and defendant further alleged that the assessment and taxation of the stock and assets of the Forth Smith Lumber Company for the full measure of taxation without deduction of the value of the stock and assets of the Choctaw Investment Company and the Central Railway of Arkansas, which stock and assets were separately assessed and taxed, would be to the extent of the value of the stock and assets of the Choctaw Investment Company and the Central Railway of Arkansas double taxation, which is contrary to the Constitution of Arkansas, and the enforcement of it would be contrary to the due process and equality provisions of the Fourteenth Amendment of the Constitution of the United States; and defendant further alleged in its answer that under a proper construction of the taxing statutes of Arkansas it was not liable to taxation on capital stock in other Arkansas corporations which it owned, when such other corporations had been assessed and paid their taxes on all of their assets and the value of their stock, and that if the laws of Arkansas were construed to thus require the defendant to pay on such stock owned by it in other corporations which paid their full measure of taxation, in addition to paying on all of the assets and stock of the owning corporation, that the said law so construed would be in violation of the Fourteenth Amendment of the Constitution of the United States in that such construction would make an arbitrary classification of property owned by a corporation, which said construction would not apply if an individual owned such property under similar circumstances, and that under such construction of the taxing statutes of Arkansas the defendant would not have the equal protection of the laws and its property would be taken without due process; that nothwithstanding the above stated claims of the defendant, the Chancery Court entered judgment against this defendant for the taxes upon the value of the stock owned by it in the Choctaw Investment Company and the Central Railway of Arkansas for a series of years, notwithstanding that said Choctaw Investment Company and Central Railway of Arkansas had separately paid their full measure of taxation upon their assets and stock; that the defendant appealed from said decree of the Chancery Court to the Supreme Court of Arkansas, and said Court, as aforesaid, did, on May
57 5, 1919, notwithstanding the rights and immunities claimed under the Fourteenth Amendment to the Federal Constitution therein set up and relied upon against such construction of the taxing statutes, affirm said decree of the Sebastian Chancery Court, Fort Smith District.

Your petitioner alleges that said decision denies to this appellant the equal protection of the laws and takes its property without due process; and your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, your petitioner prays that a writ of error may be issued in this cause from the Supreme Court of the United States to the Supreme Court of Arkansas for the correction of errors so complained of, and that a transcript of all of the record, proceedings and papers

in this cause, duly authenticated by the Clerk of the Supreme Court, may be sent to the Supreme Court of the United States as provided by law.

Dated this 19th day of May, 1919.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Petitioner and Plaintiff in Error.

Let the writ of error issue upon the execution of a bond by The Fort Smith Lumber Company to the State of Arkansas in the sum of forty thousand ($40,000.00) dollars; such bond when approved to act as supersedeas.

This May 19, 1919.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed May 27, 1919.
W. P. SADLER, *Clk.*,
By J. H. CAMPBELL, *D. C.*

58 In the Supreme Court of Arkansas.

FORT SMITH LUMBER COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS ex Rel. ATTORNEY GENERAL, Defendant in Error.

Bond.

Know all men by these presents:

That Fort Smith Lumber Company as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Arkansas in the sum of Forty Thousand Dollars ($40,000.00), for the payment whereof well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Whereas, the above named Fort Smith Lumber Company, plaintiff in error, has sued out a writ of error from the Supreme Court of the United States to the Supreme Court of Arkansas to reverse the judgment of the Supreme Court of Arkansas rendered on the 5th day of May, 1919, in the suit of Fort Smith Lumber Company, appellant, vs. State of Arkansas, ex rel. Attorney General, appellee.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer for all costs and damages that may be adjudged,
59 if it fails to make good its plea, then this obligation is to be void; otherwise to remain in full force and effect.

In testimony whereof, we have hereunto set our hands and seals this 24th day of May, 1919.

[SEAL.] FORT SMITH LUMBER COMPANY,
By C. W. JONES, *General Manager,*
Principal.
AMERICAN SURETY COMPANY OF NEW YORK,
By H. P. WARNER,
Resident Vice-President.

Attest:
HARRY K. ALBERS,
Resident Assistant Secretary.

Approved this 27 day of May, 1919.
E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed May 27, 1919.
W. P. SADLER, *Clk.,*
By J. H. CAMPBELL, *D. C.*

60 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, and in the affirmance of the judgment of the Sebastian Chancery Court, Fort Smith District, which was in the Supreme Court of Arkansas, (being the highest court of law or equity of said State in which a decision could be had) in a suit between Fort Smith Lumber Company, appellant, vs. State of Arkansas, ex rel, Attorney General, appellee, wherein was drawn in question the validity of a statute of the State of Arkansas authorizing such a suit for the collection of alleged taxes for under valuation against corporations and not against individuals, and where was drawn in question the validity of the taxing statutes of the State of Arkansas which, as construed by the Court, were contrary to the equality and due process clauses of the Fourteenth Amendment of the Federal Constitution, and the decision was against the title, rights, privileges and immunities as specially set up and claimed under said clauses of the Fourteenth Amendment by the plaintiff in error; a manifest error hath happened to the great damage of the said Fort Smith Lumber Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington, within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause to be done
61 therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27 day of May, 1919, in the year of our Lord one thousand nine hundred nineteen.

[The Seal of the District Court of East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk of the District Court of the United States for the Eastern District of Arkansas.
By W. P. FEILD, JR., *D. C.*

Allowed by:
E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

Filed May 27, 1919.
W. P. SADLER, *Clk.*,
By J. H. CAMPBELL, *D. C.*

62 Supreme Court, State of Arkansas, *ss:*

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 27th, 1919, in the matter of Fort Smith Lumber Company, a corporation, versus The State of Arkansas, ex rel. Attorney General.

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this May 28th, 1919.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

63 UNITED STATES OF AMERICA, *ss:*

To the State of Arkansas, Through John D. Arbuckle, Attorney General, and George Vaughn, Special Counsel:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Arkansas, wherein Fort Smith Lumber Company is plaintiff in error, and State of Arkansas, ex rel. Attorney General, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Arkansas, this 27 day of May, 1919, in the year of our Lord one thousand nine hundred nineteen.

E. A. McCULLOCH, [SEAL.]
Chief Justice of the Supreme Court of Arkansas.

Attest:
W. P. SADLER,
Clerk of the Supreme Court of Arkansas.

We acknowledge receipt of copy of attached citation, and waive formal service thereof.

Given under our hands this 27th day of May, 1919.

STATE OF ARKANSAS.
JNO. D. ARBUCKLE,
Attorney General.
GEORGE VAUGHAN,
Atty. for Pltff., State of Arkansas.

Filed May 27, 1919.
W. P. SADLER, *Clk.*,
By J. H. CAMPBELL, *D. C.*

64 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Arkansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this May 28, 1919.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

Costs of Suit.

In chancery court	7.65
Supreme Court Costs	41.10
Transcript, pursuant to Writ of Error	21.50

Paid by Plaintiff in Error.

Endorsed on cover: File No. 27,148. Arkansas Supreme Court. Term No. 394. Fort Smith Lumber Company, plaintiff in error, vs. The State of Arkansas ex rel. John D. Arbuckle, Attorney General. Filed June 2d, 1919. File No. 27,148.

Office Supreme Court, U. S.
FILED
JUN 14 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 394.

FORT SMITH LUMBER COMPANY, PETITIONER,

vs.

THE STATE OF ARKANSAS EX REL. THE ATTORNEY GENERAL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Petitioner.

(27,148)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 394.

FORT SMITH LUMBER COMPANY, PETITIONER,

vs.

STATE OF ARKANSAS EX REL. JOHN D. ARBUCKLE, ATTORNEY GENERAL, RESPONDENT.

NOTICE.

To the Honorable John D. Arbuckle, Attorney General of the State of Arkansas:

You are hereby notified that the petitioner in the above-entitled cause did file the record of this case in the Supreme Court of the United States on June 2, 1919, on writ of error properly issued to said Supreme Court of Arkansas, bringing up the complete record of the proceedings therein.

You are further notified that the petitioner will, on the first Monday in October, present to the Supreme Court of the United States a petition for a writ of certiorari to issue in the above-entitled cause to bring before that court all of the issues raised and determined against the contentions made

by the petitioner in the Supreme Court of Arkansas. A copy of said petition is herewith attached hereto.

The petitioner further notifies you that on said date it will request the clerk of the Supreme Court to present its petition to the court.

Given under our hands this the 10th day of June, 1919.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Plaintiff in Error and Petitioner.

I hereby acknowledge receipt of the above and foregoing notice, together with a copy of the petition for writ of certiorari to be presented to the Supreme Court as therein stated.

Given under my hand this the 12 day of June, 1919.

JNO. D. ARBUCKLE,
Attorney General of the State of Arkansas.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 394.

FORT SMITH LUMBER COMPANY, *Petitioner,*

vs.

STATE OF ARKANSAS EX REL. JOHN D. ARBUCKLE, *Attorney General, Respondent.*

Petition for Certiorari.

Comes the Fort Smith Lumber Company, petitioner herein, and alleges:

That the State of Arkansas on the relation of the Attorney General brought suit in the chancery court of Sebastian County, Fort Smith District, against it under act 169 of the General Assembly of 1913, which act authorized the Attorney General to bring suits against corporations to recover of them taxes because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money or any property, or because of any inadequate or insufficient valuation or assessment of such property, or under-valuation thereof, or from any other cause. That the complaint alleged that the petitioner was an Arkansas corporation domiciled at Fort Smith, and that it owned during the years in question 2,600 shares of the stock of the Central Railway of Arkansas and 3,480 shares of the stock of the Choctaw Investment Company; and that the Central Railway of Arkansas and the Choctaw Investment Company were each Arkansas corporations.

For brevity, the petitioner will be referred to as the Lumber Company, the Choctaw Investment Company as the Investment Company, and the Central Railway of Arkansas as the Railway Company.

That the Railway Company, in assessing and paying taxes, omitted from its assessment and taxation the value of the stock owned by it in the Investment Company and the Railway Company; that the value of such omitted stock was alleged each year and the rate of taxation applicable thereto, and the amount of taxes due thereupon on a basis of fifty per cent of the actual value was alleged; that it appeared both in the complaint and the answer that in Arkansas during the period in question all property was assessed on a basis of fifty per cent of its actual value, which, for convenience, will be referred to as the taxable value; that judgment was prayed in behalf of the State and its subordinate agencies for the taxes for each year mentioned in the period complained of on said basis of fifty per cent of the value of the stock owned by the Lumber Company in the Investment Company and the Railway Company; that the answer admitted the corporate character of the petitioner and of the Investment Company and the Railway Company, and alleged that all of the assets of each of said corporations were situated in the State of Arkansas; that the answer admitted that the Lumber Company owned during the period referred to a substantial amount of stock in the Investment Company and in the Railway Company (not, however, the amount alleged), and that it did not assess and pay taxes upon the value of said stock owned by it, because each of said corporations, under the laws of Arkansas, are required to assess and pay taxes upon all of their stock and assets, and each had done so; that the Railway Company was assessed by the Tax Commission for recent years, and prior to its creation, by a board of State officers delegated with the duty of assessing railroad property; that all of the assets of the Investment Company consisted of real estate, being timbered lands, and as such were assessed locally where situated, and in most instances the assessment determined by the county court of the county where the land was situated; that during the years complained of the Railway Company was assessed and paid its full quota of taxes upon a value equal

to or in excess of similar property throughout the State; and that during said years all the assets of the Investment Company were likewise assessed the full quota of taxation upon a value equal to or in excess of similar property throughout the State; that the Lumber Company was assessed and paid its full quota of taxes upon all of its assets except the stock owned by it in the Investment Company and the Lumber Company upon a valuation equal to or in excess of all other similar property in the State; that it did not assess or pay taxes upon the stock owned by it in the Investment Company or Railway Company because the same would be double taxation if it were required to do so, as the full taxable value of such stock had been paid upon by each of said corporations separately, as each were under the law required to do, and the assessment and taxation against the assets of each of those corporations were equal to or in excess of the value of stock in them; that the Lumber Company alleged that to require it to again pay upon the stock owned in said corporations would be double taxation, contrary to the Constitution of Arkansas and violative of the taxing statutes of Arkansas, and contrary to the Fourteenth Amendment of the Constitution of the United States; that the Lumber Company further alleged that the act of the General Assembly referred to was in violation of the Constitution of Arkansas and of the United States in that it discriminated against corporations as such in providing for the collection of taxes against them for under-valuations or omissions when in similar circumstances taxes could not be collected from individuals, and it was therefore a denial of the equal protection of the laws to the Lumber Company as a corporation; that the allegation of the answer most pertinent to this petitioner is as follows:

> "The defendant further alleges that under a proper construction of the taxing system of the State of Arkansas it is not liable to taxation on capital stock which it owns in other corporations, where such other corporations have been assessed and fully paid

taxes upon all of their assets, and if the laws of Arkansas are construed to thus require the defendant to pay on stock owned in other corporations, in addition to paying taxes on all the assets of such other corporations, the said laws so construed would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that there would be an arbitrary classification of property owned by a corporation, which such construction would not apply if an individual owned said stock under like circumstances, and the defendant would not have equal protection of the laws and its property would be taken without due process."

That the State demurred to this answer, and the chancery court overruled it, and the State appealed from said decision to the Supreme Court, and the Supreme Court reversed the decree and remanded the cause with directions to the chancery court to sustain the demurrer; that that decision was not a final decision from which writ of error could be prosecuted to this court, or to which a petition for certiorari would be applicable; that on the remand of the case the State filed an amendment to the complaint, adding to its cause of action the amount of taxes which it claimed accrued to it since the filing of the original complaint; in other words, bringing the complaint down to date; that pursuant to the directions of the Supreme Court the chancery court sustained the demurrer to the answer, to which the Lumber Company duly excepted, and stood upon the rights asserted by it therein; that by agreement no default judgment was taken, and the case was tried in the chancery court on an agreed statement of facts; that the agreed statement of facts contains all the facts set forth in the answer, with the details of value, amounts, rates of taxation, etc.; that the chancery court rendered judgment against the Lumber Company for $35,681.61 for taxes on the value of the stock of the Investment Company and the Railway Company owned by it during the period, notwithstanding those corporations have paid their full quota of taxation upon all their assets, which value was, according to the agreed statement, also the full

value of the stock of said corporation; that the Lumber Company appealed from said decree to the Supreme Court of Arkansas, and on the 5th day of May, 1919, that court affirmed it.

That the petitioner filed with the Chief Justice of the Supreme Court a petition for writ of error and an assignment of errors, alleging that the decision violated the equality and due process clauses of the Fourteenth Amendment in not sustaining petitioner's attack on the statute of 1913 and in so construing the taxing statutes as to subject the Lumber Company to judgment for taxes upon the value of the stock owned by it, notwithstanding the payment of the full measure of their taxes by each of said companies separately; that the Chief Justice allowed the petition and a writ of error was duly issued and citation has been served, and the record was filed in this court on June 2, 1919, and the case is now pending in this court on said writ of error.

Reasons for Granting the Writ.

Under the act of Congress of September 6, 1916, a writ of error is applicable to at least a part of the questions raised, and may be as to all of them. There was "drawn in question the validity of a statute of, or authority exercised under any State, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity." Specifically in this case, act 169 of the Legislature of 1913, under which the action is brought, was drawn in question as an act discriminating against corporations as such in taxation contrary to the equality and due process clauses of the Fourteenth Amendment. So far there is no room for certiorari, and that statute is unquestionably subject to consideration by this court on the pending writ of error. But this statute had been sustained by the Supreme Court of Arkansas before this case went to it, and the decision in this case upon it was formal, although the petitioner attacked it from the answer on up. Beyond affirmatively sustaining this statute the court did

not enter into a discussion of it, but discussed the questions left open after that statute was sustained, and in those questions was a deeper one: that under a valid statute to recover back taxes applying to individuals as well as corporations, the taxing statutes of Arkansas did not authorize the recovery of the taxes sued for.

It was further alleged and insisted that if the court did so construe the Arkansas taxing statutes as to permit recovery under the facts, that they would be in violation of the equality and due process clauses of the Fourteenth Amendment. When the answer was drawn the petitioner was relying upon being protected against this discriminatory double taxation on a proper construction of the Constitution and Statutes of Arkansas, which it alleged forbade it, but realizing that the Attorney General was contending for a different construction, the petitioner further alleged (and that part of the answer is quoted in full heretofore) that if the constitution and taxing statutes of Arkansas was so construed, then such statutes thus construed were violative of the equality and due process clauses aforesaid. The validity of these statutes is not directly drawn in question, as was the act of 1913, because they then had not been construed to sustain the taxation claimed, and were not so construed until the decree herein was affirmed. It may be that the affirmance of the decree was "an authority exercised" which was "drawn in question" on the ground of it being repugnant to the Constitution of the United States. If such is the proper construction of the procedure, then the writ of error reaches to the subject-matter of the controversy as well as to the statute of 1913, and the assignment of errors brings to the consideration of this court our contentions made on this subject, which were unavailing in the Supreme Court of Arkansas. If such be the case, then there is no occasion for certiorari. We are unable to find a precedent in this court ruling on this question. On the other hand, under said act of September 6, 1916, certiorari is the proper method to review a decision of the highest court of a state, "where any title, right, privilege or immunity is claimed

under the constitution * * * and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such constitution * * * ." Certainly, immunity under the equality and due process clauses from such taxation as the State sought to impose, and by the decision finally imposed, was especially set up and claimed by the petitioner. Therefore, if this be the proper construction of the procedure under the act of 1916, certiorari is the proper remedy to bring that subject under review here.

The Merits.

We urged upon the Supreme Court of Arkansas not to adopt the construction of the taxing statutes contended for by the Attorney General, for these reasons:

(*a*) That under the decision of Greene *vs.* L. & I. R. R. Co., 244 U. S., 499, that uniformity in taxation meant not only in the rate of taxation, but also uniformity of the mode of assessment upon taxable valuation, and a mode of assessment applicable to the corporation stockholder, which would render double taxation on the value of the stock not applicable to an individual stockholder, was offensive to equality in taxation as construed by this court.

(*b*) We quote from our brief our next contention:

> "The mode of assessment which requires a corporation to pay taxes upon corporation shares which have in them taxable value derived from ownership in shares of another corporation, which other corporation is by law required to separately assess and pay taxes upon the value in those shares, is duplicate taxation, inimical to the equality and due process clauses of the Fourteenth Amendment."

We relied upon the following cases to sustain this contention:

Ind. Ter. Ill. Oil Co. *vs.* Oklahoma, 240 U. S., 522.

Delaware, L. & W. R. Co. *vs.* Pennsylvania, 198 U. S., 341.

Louisville & Jeffersonville Ferry Co. *vs.* Commonwealth of Kentucky, 188 U. S., 385.

(*c*) We contend that the case of Delaware, L. & W. R. R. Co. *vs.* Pennsylvania, 198 U. S., 341, establishes this principle: that there was no distinction between a tax assessed against the Lumber Company for the value of stock owned by it in the Investment Company and in the Railway Company, and a tax against the property of the Investment Company and the Railway Company; that the tax herein sought to be levied against the Lumber Company was essentially a tax against this specific property represented by the stock in the Investment Company and the Railway Company, and where the property of the Investment Company and Railway Company is insusceptible of taxation (in this case because already fully taxed, and in the Pennsylvania case because the property was out of the jurisdiction), a tax cannot be sustained indirectly by taxing the stock which represents it. Such was also the purport of the decision in Ind. Ter. Ill. Oil Co. *vs.* Oklahoma, 240 U. S., 522.

(*d*) Finally we pressed on the court the recent decision of this court in Bank of California *vs.* Richardson, decided January 27, 1919. The situation in this record was exactly the same as that in the California case. The Bank of California was taxed on the value of the total assets amounting to $15,775,252.67, included in which was the value of stock owned by it in the Mills National Bank and in the Mission State Bank, and the stock of each of these banks was separately assessed and taxed. This court held in the instance of the tax against the California Bank representing the value of the stock in the Mills National Bank that it was properly assessed as a stockholder, and that the value of that stock could not again be taxed against the stockholders of the Bank of California. And in the instance of the stock in the Mission State Bank it was held that it was properly included in the assessment of the value of the assets of the Bank of

California, but that the separate assessment against the Bank of California as a stockholder in it could not be sustained. Thus the whole assets of the Bank of California in these different ways were taxed once, but not twice. Here the state had taxed separately the whole assets of the Investment Company and the Railway Company, and, by the decree again, taxing these assets in the guise of taxing stock representing their value owned by the Lumber Company. Clearly, under the decisions of this court pressed upon the Supreme Court of Arkansas, this tax cannot be sustained.

Wherefore, in order that the issues may be squarely before this court, without being complicated as to whether the questions sought to be reviewed are to be brought here by writ of error or writ of certiorari, it is prayed that the writ of certiorari issue to the end that the issues presented in the record now here be brought before the court for consideration and decision, and that thereby the case be determined on its merits without question of the applicability of the procedure through which it is brought here.

It is further prayed that when the writ be granted that the case upon certiorari be consolidated with the case on writ of error, and the issues tried as one case on their merits.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Petitioner.

[Endorsed:] Supreme Court of the United States. Fort Smith Lumber Co. P. E., *vs.* State of Arkansas ex rel. the Attorney General, respondent. Petition for Certiorari and Notice. Office of the Clerk, Supreme Court, U. S. Received June 14, 1919. Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Petitioners.

Endorsed: File No. 27,148. Supreme Court U. S. October Term, 1919. Term No. 394. Fort Smith Lumber Company, Petitioner, *vs.* The State of Arkansas ex rel. the Attorney General. Petition for writ of certiorari, notice and proof of service. Filed June 14, 1919.

JUDD & DETWEILER, INC., PRINTERS.
WASHINGTON, D. C.

Office Supreme Court, U. S.
FILED
AUG 25 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 394

FORT SMITH LUMBER COMPANY
PLAINTIFF IN ERROR

VS.

THE STATE OF ARKANSAS, EX REL.,
THE ATTORNEY GENERAL,
DEFENDANT IN ERROR

Also the Same Case on
Petition for Certiorari on the Same Record

Abstract and Brief for the Plaintiff in Error

JOSEPH M. HILL and
HENRY L. FITZHUGH,
Attorneys for Plaintiff in Error.

(27,148)

INDEX

	PAGES
THE PRACTICE	1-2
STATEMENT OF THE CASE	2-19
The Complaint	3-4
The Answer	4-8
History of the Litigation	8-13
Assignment of Errors	13-15
AGREED STATEMENT OF FACTS	15-19
ARGUMENT	20-65
Presentation of Federal Questions	20-25
The Taxing System of Arkansas	25-30
Federal Rights Violated	30-65
(a) The Act is Void	30-45
(b) The Decree Violates Due Process and Equality Clauses	45-49
ANALYSIS OF BANK OF CALIFORNIA CASE	49-65

CITATIONS

	PAGES
Dallas County v. Home Ins. Co., 97 Ark. 354	8
State v. Bodcaw Lumber Co., 128 Ark. 505	8, 9, 25, 37, 53
State v. Fort Smith Lumber Co., 131 Ark. 40	11, 59
Murray v. Charleston, 96 U. S. 432	20
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291 S. C. 63 L. R. A. 42	20
Taylor Jurisdiction and Proc., p. 443	21
Tregea v. Modesto Irr. Dist., 164 U. S. 179	21
Hendersonville etc. v. Blue Ridge etc., 243 U. S. 563	22
First National Bank v. Bank, 92 Ark. 335	26
Hempstead County v. Hempstead County Bank, 73 Ark. 515	35, 63
State v. K. C. & M. etc., 117 Ark. 606	37, 43, 45
Winona etc. v. Minnesota, 159 U. S. 526	43, 44
Greene v. Louisville etc., 244 U. S. 499	46
I. T. Oil Co. v. Okla., 240 U. S. 522	47, 48
Delaware etc. v. Pa., 198 U. S. 341	47, 48
L. & J. Ferry Co. v. Ky., 188 U. S. 385	47
Kidd v. Ala., 188 U. S. 730	47
Hawley v. Malden, 232 U. S. 1	47
Bank of California v. Richardson, Ms. Op.	50-65
Bank of California v. Richardson, 173 Cal. 398	53

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 394

FORT SMITH LUMBER COMPANY
PLAINTIFF IN ERROR

VS.

THE STATE OF ARKANSAS, EX REL., JOHN D. ARBUCKLE, ATTORNEY GENERAL

—and—

FORT SMITH LUMBER COMPANY, PETITIONER

VS. *CERTIORARI*

THE STATE OF ARKANSAS, EX REL., ATTORNEY GENERAL, RESPONDENT

Abstract and Brief for the Plaintiff in Error

The Practice.

This brief is prepared in advance of the action of the court on the petition for the writ of certiorari, and upon the belief that all the questions presented will be considered by the court either on the writ of error, or

supplemented by the same questions raised on the writ of certiorari. In order to avoid the troublesome question of practice as to whether the writ of error brings to the consideration of this court all of the questions sought to be reviewed, the plaintiff in error also became a petitioner for a writ of certiorari which is presented on the same record and is here for determination. It is thought that in this way every phase of the contentions of the plaintiff in error is presented, and they will be discussed irrespective of their mode of review, as there is but one record, and the questions are raised in both ways.

STATEMENT OF THE CASE

Amending and extending the preceding acts upon the same subject, the General Assembly of Arkansas, on March 12, 1913, enacted Act No. 169, which reads as follows:

> "That section of 7204 of Kirby's Digest of the statutes of Arkansas be amended to read as follows:
>
> "Where the Attorney General is satisfied from his own investigations, or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned or because of any inadequate or insufficient valuation or assessment of said property or under valuation thereof, or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid; that it shall

become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same, in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated, in which suit or suits the corporation owing such taxes or any corporation claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant, and the Governor is authorized to employ any attorneys that may be necessary to assist the Attorney General in such suits: *provided*, that this Act shall be construed as retrospective as well as prospective in operation."

On May 20, 1916, (R. 6) the State of Arkansas on the relation of the Attorney General filed a complaint in equity under said Act in the Sebastian Chancery Court, Fort Smith District, against Fort Smith Lumber Company.

The Complaint.

The substance of the complaint is that the defendant is a corporation created under the laws of Arkansas and domiciled in Fort Smith, operating saw mills and manufacturing lumber in various counties of the State, and is the owner of real and personal property situated in said counties, the classes of which are enumerated: That the defendant owned 2600 shares of stock of the Central Railway of Arkansas, an Arkansas corporation, of the actual value of $260,000 and invested $260,000 of its own capital stock in the capital stock of said railway company: That it owned 2470 shares of the capital stock of the Choctaw Investment Company, an Arkansas corporation. The value of this stock, variously stated in different years as the amount

of holdings would increase, was finally alleged to have been $572,000, and the defendant invested of its own capital stock said amount in the capital stock of the Choctaw Investment Company: That the defendant did not assess and pay taxes on the value of the capital stock of said corporations, for brevity hereinafter referred to as the Railway Company and the Investment Company, and the owning company as the Lumber Company. And it is alleged that it thereby escaped taxation of the value of the stock owned by it in said corporations. The schedule of the owning in each year from 1906 to the filing of the complaint was set forth showing the alleged value of the stock in said corporations. Judgment was prayed for the State and its various political subdivisions for which it sued, for the amount of taxes due upon the taxable value of the stock in said corporations for each year they were owned by the Lumber Company. (R. 1 - 6.)

The Answer.

We insert herewith in full the answer, and italicize one paragraph to sharply call attention to it, because that paragraph, although abandoned by the defendant before the case reached the Supreme Court, yet was the point of decision of the Supreme Court on both the first and second appeal of this case to that court. The opinions of the court show that no consideration of the Federal questions presented in the answer ,and the decision was reached upon another point, but the decision was an effectual denial of the asserted rights set forth in the answer. The answer is as follows:

"Comes the defendant, Fort Smith Lumber Company, in answer unto the complaint here, and says:

That it has for each of the years mentioned in the complaint made due and proper return of its property for taxation and has paid taxes upon all its property as required by law and in equal proportion to taxes paid

by other owners of property. All statements in the complaint that the defendant has not made proper return and has not been properly assessed are not true and are specifically denied, and alleges that each year it made out its assessment as required by Sec. 6936 Kirby's Digest and Amendatory Act.

That it is true that during the years named the defendant was the owner of certain shares of the capital stock of the Central Railway of Arkansas; the amount of shares owned by it are not accurately stated in the complaint: that the property of the Central Railway of Arkansas has each year been assessed as required by the laws of the State of Arkansas by the Tax Commission, and prior to the creation of the Tax Commission, by the board composed of State officers delegated with said duty: that the Central Railway of Arkansas is a railroad corporation and is assessed as such and has for each of the years mentioned in the complaint paid its full quota of taxes: that the capital stock, owned by the defendant, of the Central Railway of Arkansas has not been separately assessed, because the same would be a double taxation upon the property of the Central Railway Company of Arkansas, and a double taxation upon the owners of said stock, if it were required to be so assessed and taxed: that it has been assessed and taxed in strict accordance with law and it has been assessed and paid taxes upon a basis equal to that of all other property in the State of Arkansas, to-wit: on a basis of fifty per cent of its true value, which is in excess of the average amount of assessment against the property in the State: which assessment is equal to or in excess of the value of its capital stock on a basis of fifty per cent: that to require this defendant to pay upon the stock owned by it would be double taxation contrary to the Constitution of the State of Arkansas, contrary to the Fourteenth Amendment of the Constitution of the United States and violative of the taxing statutes of the State of Arkansas.

The defendant states that it is true that it has until recently owned shares of the capital stock of the Choctaw Investment Company, which was an Arkansas corporation, but which has now been dissolved: that the amount of its ownership of said shares is not accurately stated in the complaint, but it has during the various years mentioned owned a substantial amount of the stock of the Choctaw Investment Company: that all of the assets of the Choctaw Investment Company consisted of timber lands and that all of said lands were assessed at a value equal to, if not in excess of, the assessment of all other land similarly situated, and at a value equal to or in excess of the value of its capital stock on a basis of 50 per cent., and the taxes have for each year mentioned in the complaint been fully paid upon the assessment made upon the assets of said Choctaw Investment Company; that most, if not all, of the assessments against the Choctaw Investment Company were fixed by the county courts of the counties wherein the lands were situated, on appeal from the Boards of Equalization of said counties, that the defendant has not returned as assessable the corporation stocks owned by it in the Choctaw Investment Company, because the assets represented by said investment had been taxed as real estate and paid upon as real estate, and to tax the same again in the form of corporate stock would be double taxation contrary to the Constitution of Arkansas, the Fourteenth Amendment of the Constitution of the United States and violative of the taxing statutes of the State of Arkansas.

That it is not true that the defendant's capital stock was invested and employed in the purchase and ownership of shares of stock in the Central Railway Company of Arkansas and the Choctaw Investment Company, and the defendant states the truth to be that the capital stock of the defendant which amounted to $60,000.00 *was paid in long before the acquisition of any of said stock, and was invested in timber, timber lands, saw mills and other*

property, and that the shares of stock owned by the defendant in the Central Railway of Arkansas and in the Choctaw Investment Company were acquired largely on the personal credit of the stockholders of the defendant company and were paid for principally by the stockholders and their payments refunded from the earnings of this defendant company; that it is not true that any part of the capital stock of the defendant is invested in the shares of the Central Railway of Arkansas or of the Choctaw Investment Company.

That the Choctaw Investment Company and the Central Railway of Arkansas are each Arkansas corporations and the assets of each are all situated in the state of Arkansas, and all of the assets of Fort Smith Lumber Company are situated in the State of Arkansas.

The defendant further alleges that the Act of the General Assembly under which the plaintiff is proceeding is violative of the Constitution of Arkansas and the Constitution of the United States in that its discriminates against corporations as such in providing for collection of back taxes against them when in similar circumstances back taxes could not be collected from individuals, and is therefore a denial of the equal protection of the laws to this defendant as a corporation.

The defendant further alleges that under a proper construction of the taxing system of the State of Arkansas it is not liable to taxation on capital stock which it owns in other corporations, where such other corporations have been assessed and fully paid taxes on all of their assets, and if the laws of Arkansas are construed to thus require the defendant to pay on stock owned in other corporations, in addition to paying taxes on all the assets of such other corporations, the said laws so construed would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that there would be an arbitrary classification of property

owned by a corporation, which such construction would not apply if an individual owned said stock under like circumstances, and the defendant would not have equal protection of the laws and its property would be taken without due process.

That the defendant further pleads the three years statute of limitations against all the claims except that of the state itself."

The State demurred to this answer. (R. 8.) The chancery court overruled the demurrer and held the answer set forth a defense. The State elected to stand upon the demurrer, and the complaint was dismissed, and the State appealed to the Supreme Court. (R. 9.) This explanation of the state of the law in Arkansas prior to this decision may elucidate the opinion of the court; in the case of Dallas County vs. Home Insurance Company, 97 Ark. 354, decided in 1911, the court apparently drew a distinction between investment by a corporation in shares of other corporations where the investment was made out of the original capital and where it was made from earnings or surplus. That was the construction placed upon it by the court at the time it was rendered, as evidenced by the dissenting opinion delivered in this case by Mr. Justice Hart, who was the author of the opinion in the Dallas County case. At page 45, 131 Ark. he states:

"Judge Wood and myself dissent from the opinion of the majority in this case because we believe it is in direct conflict with the principles announced in State *v.* Bodcaw Lumber Company, 128 Ark. 505.

"The opinion of the majority relies for its support upon the case of Dallas County *v.* Home Fire Insurance Co., 97 Ark. 254. In the first place, it may be said that we do not think that case is susceptible of the construction now placed upon it by the majority. In that case

the court was considering the subject of taxation of an insurance company where practically all of the original capital stock was invested in certificates of stock of other domestic and foreign insurance companies. The court reached the conclusion that the shares of stock in the other insurance companies were not taxable in the hands of the Home Fire Insurance Company, but that the original capital stock of the insurance company was subject to taxation.

"In the first mentioned case the words 'capital stock' were used to denote the money which the shareholders paid into the corporation when it was organized. In the Bodcaw Lumber case the words 'capital stock' were used in a much broader sense and the court adopted an entirely different system of valuing the capital stock of a corporation for taxation. The court said that the words 'capital stock' means shares of a corporation in their aggregate, and not the capital of the corporation as represented by its tangible assets. The meaning thus given to the words 'capital stock' does not change their meaning as used in the Dallas County case. When that case is considered the words must still be considered to mean what the court intended them to mean in that case."

The answer was filed in this case June 23, 1916. (R. p. 8.) The Supreme Court decided the Bodcaw Lumber Company case March 12, 1917. (See State ex rel. Attorney General *v.* Bodcaw Lumber Company, 128 Ark. 505.)

As indicated in the quoted excerpts from Justice Hart's opinion the definition of capital stock for taxation purposes made by the court in that case rendered untenable the paragraph of the defendant's answer heretofore set forth in italics. This case was heard in the chancery court on March 26, 1917. (R. 9,) just two weeks after the decision in the Bodcaw Lumber Company case, and of course this paragraph of the answer could

no longer be insisted upon in the face of this definition of capital stock adopted by the court in that case, which overruled the Dallas County case, at least to the extent of using the term "capital stock" differently from what it was therein used. As stated, the chancery court sustained the answer as presenting a defense, and the State appealed. The Attorney General, in his abstract and brief of the case in the Supreme Court, did not present this abandoned defense, and the defendant (appellee then,) other than to state the facts and copy the answer, did not present it as a defense, but relied entirely upon other matters set forth in the answer. The Supreme Court determined the case as if this abandoned paragraph of the answer was the only matter presented to it, whereas, it was not presented at all other than it was still in the answer and the facts thereof were stated. The result was the reversal of the decree and a remand of the case to the chancery court with directions to sustain the demurrer and proceed in accordance with the opinion. The opinion of the court is found in the record pp. 23-25, and an examination of it shows that it ignored all of the other matters set forth in the answer and upon the allegations therein that if the construction of the Constitution and statutes of Arkansas contended for by the Attorney General should be sustained that such construction would bring the Constitution and statutes in conflict with the equality and due process clauses of the Fourteenth Amendment, the silence of the court was profound. This was not only set out in the answer but the summary of counsel's briefs shows it was insisted upon in the briefs and the authorities to sustain the contention are cited. See 131 Ark., on p. 41.

We filed motion for rehearing on the ground that we had not insisted upon this paragraph and the court had not decided the other questions presented. The court rendered a brief opinion upon the rehearing, but did not admit that we had throughout abandoned the defense up-

on which the case was decided, but did state that we did not then insist upon it, which opinion is not copied into the record, as the clerk probably thought it was no part of the decisive opinion, but we copy the same from pages 44, 45 of 131 Arkansas Reports, and it reads as follows:

"Counsel for appellee now disclaim any intention of asserting a distinction between the right of a corporation to deduct from its assessment of original capital stock the value of shares of stock in another corporation, and the right to make such deduction from accumulated surplus, and they take the broader position that corporation has the right to such deduction either from the original capital stock or from accumulated surplus. That contention is answered by the decision of this court in the case of Dallas County *v.* Home Fire Insurance Company, 97 Ark. 254, as shown in the former opinion in the present case. The force of that decision was not impaired by the recent case of State ex rel. *v.* Bodcaw Lumber Company, 128 Ark. 505. On the contrary, we think that the two decisions are in harmony.

"We do not decide that a corporation holding shares of stock in another corporation must assess the same separately in addition to its own capital stock, but we do hold that such corporation can not deduct the value of such shares of stock from the assessment of its own capital stock, which includes accumulated surplus."

Thus it is seen, that even though brought sharply to the attention of the court that we were making no defense in that court on the fact that the investment in the railway stock and the investment company stock was made from the earnings rather than the original capital of the company, yet it runs through the opinion on rehearing that the question of the acquisition of this stock through surplus earnings was the controlling thought of the court. That decision was that the chancery court erred in over-

ruling the demurrer to the answer and the case was remanded for further proceedings. That decision was not under the practice in Arkansas a final decision, as the right of amendment existed on the remand to both parties. Therefore that decision was not the subject of review in this court either by writ of error or certiorari.

When the case went back to the chancery court the State filed an amendment to the complaint bringing her alleged cause of action down to date, suing for the taxes alleged to have accrued between the date of filing the original complaint up to and including the current year. Pursuant to the mandate, the chancery court sustained the demurrer to the answer, and the defendant excepted to the ruling and elected to stand on its answer. The court, by consent of parties, heard the cause on the complaint, amendment to the complaint, and the agreed statement of facts, it being expressly stipulated that no default judgment be taken on account of the refusal of the defendant to file an amended answer. (R. 12.) The Court ordered the agreed statement of facts to be inserted in the decree as part of the record, and said agreed statement of facts was all of the evidence introduced. (R. 12). This agreed statement of facts will be set forth in full later.

The court found the defendant was liable for the back taxes upon fifty per cent of the value of the stock owned by it in the Railway Company and in the Investment Company for each years set forth, aggregating $35,681.61, for which judgment was rendered. (R. 15-17.) (50 per cent was the taxable basis. R. p. 13-14.) The defendant appealed to the Supreme Court, and on the 5th of May, 1919, it rendered a decision affirming the decree of the chancery court. (R. 23.) The opinion (R. 19-23) states that the parties prepared an agreed statement of facts upon which the case was submitted, and copies it in full, omitting the amounts. The court decided that no issue was presented that was not in-

volved in and disposed of by the opinion on the former appeal. (R. 22.) The court quotes the paragraphs in the former opinion setting forth the abandoned defense that the purchase of this stock was from surplus earnings and not original capital stock, and the holding of the court against this abandoned defense. The opinion ignores all other parts of the answer and the silence on the asserted rights under the Fourteenth Amendment is again profound. From this final judgment of the Supreme Court we obtained a writ of error, and in pursuance thereof the record is here. We also, upon that same record, filed a petition for writ of certorari, as hereinbefore stated, in order that the rights asserted might be considered by the court irrespective of whether they should be brought here by writ of error or writ of certiorari. The assignment of errors presents the questions sought to be reviewed whether the case is considered on the writ of error alone or supplemented by the writ of certiorari, and it is as follows:

ASSIGNMENT OF ERRORS

Now comes Fort Smith Lumber Company, petitioner and plaintiff in error, by its attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with its petition for writ of error says:

That in the record and proceedings and in the rendering of the judgment and the decision of the Supreme Court of Arkansas in the above cause manifest error has intervened, to the prejudice of this petitioner and plaintiff in error, in this, to-wit:

First: The Court erred in not declaring Act 169 of the General Assembly of the State of Arkansas of 1913 under which this suit is prosecuted, to be void as creating an arbitrary classification of property owned by corporations and discriminating against corporation

ownership of property contrary to the equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Second: The Court erred in construing the Constitution of the State of Arkansas and the taxing statutes of the State so as to authorize and require taxation upon the full value of the stock and assets of the Fort Smith Lumber Company without deducting therefrom the value of the stock owned by it in the Choctaw Investment Compaiy and the Central Railway of Arkansas, which were separately assessed and taxed their full measure of taxation; and the Court in so construing the constitution and the statutes thereby made such taxation of Fort Smith Lumber Company, to the extent of the taxation upon the value of the stock of the Choctaw Investment Company and the Central Railway of Arkansas owned by it, double taxation, contrary to the equality and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Third: The Court erred in construing the Constitution and taxing statutes of Arkansas so as to authorize and require taxation upon the full value of its capital stock and assets, including therein stock owned by it in Choctaw Investment Company and Central Railway of Arkansas, upon which stock and assets of said Choctaw Investment Company and Central Railway of Arkansas there had been separate assessments and taxation as required by the laws of Arkansas; and that the construction thus placed upon the Constitution and taxing statute rendered same an arbitrary classification of property owned by a corporation, which said construction did not apply to similar property owned by an individual, and that under said taxing statutes so construed the defendant corporation has not the equality of the laws and its property is taken without due process, contrary to the

provisions of the Fourteenth Amendment of the Constitution of the United States.

By reason whereof, this petitioner and plaintiff in error prays that the decision of the Supreme Court of Arkansas may be reversed and justice done. (R. p. 26-27.)

AGREED STATEMENT OF FACTS

It is stipulated that the evidence, if introduced, would show the following facts, and in lieu of introducing the testimony the parties hereto have agreed that the following are the facts relative to the matters and things set forth in the pleadings herein:

1. That the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company were each, for the years mentioned in the complaint, corporations existing and doing business in the State of Arkansas, and each was duly organized under the laws of Arkansas, the Fort Smith Lumber Company and Choctaw Investment Company being organized under Section 837 and following sections of Kirby's Digest providing for the organization of corporations for manufacturing and other business, and the Central Railway of Arkansas being organized under Chapter 133 of Kirby's Digest providing for the incorporation of railroad companies. That the Fort Smith Lumber Company was authorized by its articles of incorporation, among other powers, "to own, buy, sell and deal in real estate and other property; to engage in the mercantile business and conduct commissaries; to own, buy, sell and deal in stock, bonds and securities of other corporations." That all of the assets of the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company of every kind, nature and description were during the years

mentioned in the complaint situated in the State of Arkansas, and that none of said corporations owned any assets outside of the State of Arkansas.

2. That the Fort Smith Lumber Company owned 260 shares of stock in the Central Railway of Arkansas during the years hereinafter mentioned and prior to 1909 the Central Railway of Arkansas made annual report to the State Board of Railway Commissioners, and said State Board of Railway Commissioners each year made an assessment of its property until 1909, when the Tax Commission was created, and thereafter said Railway Company made its report to the Tax Commission and the Tax Commission each year made the assessment of the railroad property: That each year hereinafter mentioned the Central Railway of Arkansas made its annual report, pursuant to statute, to said taxing body. That each year the Central Railway of Arkansas was assessed fifty per cent of the true market value of all its assets, real, personal and mixed, and including tangible and intangible property and that said assessment of fifty per cent of the true market value of its assets was also fifty per cent of the true market value of the stock of said Central Railway of Arkansas. That all other railroad property in the State of Arkansas was assessed during each of the years on the basis of fifty per cent of the true market value of all of its assets, real, personal and mixed, including tangible and intangible property: That the Railroad Company paid each year the full amount of the assessment against it. That the Central Railway of Arkansas paid no other taxes than that assessed against it by the Board of Railroad Commissioners or Tax Commission, the same being an assessment upon all of the property of whatsoever kind of the Railroad Company.

3. That the Fort Smith Lumber Company owned stock in the Choctaw Investment Company in different amounts during the several years hereinafter mentioned: That all of the assets of the Choctaw Investment Comp-

any consisted of timber lands, and it owned no personal property or any other property than said timber lands: That said lands were assessed by the assessors in the various counties in which the same were situated, and at times the assessment was finally determined by the county courts on appeal from the Board of Equalization: That the lands of the Choctaw Investment Company were each year assessed at fifty per cent of their true market value, and the lands in the counties wherein said lands were situated and throughout the State were assessed on a basis of fifty per cent of their true market value: That the assessment of fifty per cent of the true market value of said lands was also fifty per cent of the value of the stock of the Choctaw Investment Company: That the Choctaw Investment Company paid no other taxes than that assessed on said real estate, the same being all of its property.

4. That the Fort Smith Lumber Company each year made its return as required by Section 6936 of Kirby's Digest and amendatory act thereto: That it did not return for assesment the stock owned by it in the Central Railway of Arkansas or in the Choctaw Investment Company, as all of the property of the Central Railway of Arkansas and of the Choctaw Investment Company was separately assessed. It made a full disclosure of its holding of the stock in the Central Railway of Arkansas and the Choctaw Investment Company to the taxing officials who made the assessment against the Fort Smith Lumber Company. Excepting the stock owned by the Fort Smith Lumber Company in the Central Railway of Arkansas and in the Choctaw Investment Company, the assets of the Fort Smith Lumber Company, real, personal and mixed, including tangible and intangible property, were for each of the years hereinafter mentioned assessed for fifty per cent of their true market value, and said fifty per cent of the true market value of the assets was also fifty per cent of the value of the stock of

the Fort Smith Lumber Company, less the value of the stock owned by it in said Central Railway of Arkansas and Choctaw Investment Company. That all other property in the State of Arkansas of similar kind and similarly situated as the assets of the Fort Smith Lumber Company was assessed on a basis of fifty per cent of the true market value. That the Fort Smith Lumber Company each year, as hereinafter mentioned, paid the full amount of taxes assessed against it by the taxing authorities, which in some instances was fixed by the county court on appeal from the Board of Equalization.

5. That the true market value of the stock of the Central Railway of Arkansas owned by the Fort Smith Lumber Company during each of the following years was as follows, to-wit:

1907	$125,220.00
1908	125,220.00
1909	125,220.00
1910	125,220.00
1911	125,220.00
1912	130,706.00
1913	133,598.00
1914	153,290.00
1915	156,670.00
1916	182,930.00
1917	198,686.00
1918	198,686.00

That the true market value of the stock of the Choctaw Investment Company owned by the Fort Smith Lumber Company during each of the following years was as follows, to-wit:

1910	$ 74,100.00
1911	104,400.00
1912	174,000.00
1913	174,000.00
1914	210,000.00
1915	210,000.00

6. It is agreed that should the court under the foregoing statement of facts hold the Fort Smith Lumber Company liable for taxes on the value of the stock owned by it in the Central Railway of Arkansas, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "A" hereto; and that should the court hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Choctaw Investment Company, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit "B" hereto.

7. It is agreed that the foregoing facts are all the facts which are material for the determination of the issues herein.

Exhibits A and B are computations by years of amount due on said values applied to tax rate, for the Railroad Company and Investment Company stock owned by the Lumber Company, and aggregates $35,681.61. (R. p. 16-17.)

ARGUMENT

Where rights are claimed under the Federal Constitution they must be asserted in the proper place for their assertion under the state practice. Under the statutes of Arkansas the defendant may set forth in his answer as many grounds of defense, counter-claim and set off, whether legal or equitable, as he shall have, and each shall be distinctly stated in a separate paragraph. (Kirby's Digest, Sec. 6098.) Where rights are asserted under the second clause of Sec. 709 U. S. Compiled Statutes of 1901, the facts must be stated to bring the contention therein to the attention of the court, although little attention is paid to its form.

Murray v. Charleston, 96 U. S. 432.

But where rights are asserted under the third clause of Sec. 709 they must be specially set up and claimed.

Mutual Life Insurance Co. v. McGrew, 188 U. S. 291.

In the annotations to this case in 63 L. R. A., beginning at page 42 is a full review of the decisions of this court upon this subject, and we take from page 42 there in the following statement:

"A decision of the Federal question in terms is not essential. If a decision of such question was necessarily involved in the judgment rendered, it is not a matter of importance that the state court avoided all reference to the question. Chapman *v.* Goodnow, 123 U. S. 540; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574; Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232; Chicago B & Q. R. Co. *v.* Chicago, 166 U. S. 226; St. Louis Consol. Coal Co. *v.* Illinois, 185 U. S. 203."

The same principle is thus laid down by Mr. Taylor in his treatise on Jurisdiction and Procedure of the United States Supreme Court, at page 443:

"The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. A judgement which rejects the claim but avoids all reference to it is as much against the right, within the meaning of Sec. 709, as if it had been specifically referred to and the right directly refused. * * * * A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein (Des Moines Nav. & R. Co. *v.* Iowa Homestead Co. 123 U. S. 555; Erie R. Co. *v.* Purdy, 185 U. S. 148.)

We take this excerpt from the opinion of Mr. Justice Brewer in Tregea *v.* Modesto Irrigation District, 164 U. S. 179:

"A motion was made to dismiss the case on the ground of the lack of Federal question. It appears from the opinion of the Supreme Court of the state that the defendant contended before it that the attempt to bind the reconstituted district—that is, the district diminished by the exclusion of 28,000 acres, and in which his property was situated—by a vote of the district prior to such exclusion in respect to the issue of bonds, was in violation of U. S. Const., Art. 1, Sec. 10, and that it overruled and denied such contention. So there was considered by the Supreme Court of the state the distinct question of an alleged conflict between the proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights. Further, the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law.

The burden of his case from the first has rested in the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution; so that beyond the express declaration in the opinion of the Supreme Court of the state, we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented."

Mr. Justice Holmes, recently speaking for this court in Hendersonville L. & P. Co. *v.* Blue Ridge I. R. Co., 243 U. S. 563, said:

"The respondents in their answer set up that the condemnation in this manner and for the purpose alleged would be the taking of private property without due process of law, in violation of the 14th Amendment, and we assume that the record discloses a technical right to come to this court. Minneapolis & St. L. R. Co. *v.* Minnesota, 193 U. S. 53, 62; American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 91. The decision of the Supreme Court in sustaining the condemnation discusses only matters of state law, but the Chief Justice, dissenting, intimated that the taking infringed the Constitution of the United States. 171 N. C. 314, 88 S. E. 245."

Applying these principles to the facts in the record this situation is developed: The opinion of the court on both appeals ignored practically all of the matters set up in the answer except an abandoned defense as to the investment not being made from capital stock but from surplus, but other matters were specially set up and claimed in the answer and defended against a liability of the defendant for the re-taxation of the value of shares of stock it owned in the Railway Company and Investment Company, irrespective of the funds from which these investments were made. The answer alleged the facts as to the full measure of taxation of both the assets and shares of stock of the Railway Company and the Investment Company, and the taxation of all the assets and stock of

the Lumber Company except the value of the shares in said companies already taxed, and alleged that to again require the taxation of said shares of stock owned in said Railway Company and Investment Company would be double taxation, contrary to the Constitution of Arkansas and the Fourteenth Amendment of the Federal Constitution. (R. 7.)

The answer alleged that the act under which the suit was brought was discriminatory against the defendant as a corporation owner of said shares of stock, which would not apply to individual owners thereof, and was a denial to it as a corporation owner of equal protection of the laws, under the Constitution of the United States. (R. 8.) The defendant, after asserting its rights under the Constitution and taxing statutes of Arkansas to any liability for double taxation of its shares of stock in the Railway Company and Investment Company, concluded as follows:

"The defendant further alleges that under a proper construction of the taxing system of the State of Arkansas it is not liable to taxation on capital stock which it owns in other corporations where such other corporations have been assessed and fully paid taxes on all of their assets, and if the laws of Arkansas are construed to thus require the defendant to pay on stock owned in other corporations, in addition to paying taxes on all the assets of such other corporations, the said laws so construed would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that there would be an arbitrary classification of property owned by a corporation, while such construction would not apply if an individual owned said stock under like circumstances, and the defendant would not have equal protection of the laws and its property would be taken without due process."

(R. 8.)

The defendant could go no further at that time in setting up its rights under the Fourteenth Amendment, for the court had not then decided that under the Constitution and statutes of Arkansas that the defendant would be liable to this double taxation, but the defendant clearly interposed the shield of the equality and due process clauses of the Fourteenth Amendment to protect it against such construction of the Constitution and statutes of Arkansas, and thereby specially set up immunity under those clauses against such construction of the taxing system. This answer the court held insufficient on the first appeal and directed the chancery court to sustain the demurrer to it. (R. 25.) The chancery court, pursuant to the mandate, struck out this answer and the defendant excepted thereto and stood upon it. (R. 12). The chancery court then heard the cause on the complaint, amendment to the complaint and agreed statement of facts, and the agreed statement of facts was made part of the record and was all the evidence which was introduced. (R. 12.) This agreed statement of facts brought into the record every fact pleaded in the answer and supported every allegation therein. The finding of the court upon it was as follows:

"The Court finds that under the opinion of the Supreme Court and Mandate in this case it must find, contrary to its previous ruling herein on the same state of facts, that the Fort Smith Lumber Company is liable for taxes upon fifty per cent of the market value of the stock owned by it in the Central Railway of Arkansas and in the Choctaw Investment Company for each of the years which said Fort Smith Lumber Company owned said stock respectively.

"The Court further finds that for each of said years it holds the Fort Smith Lumber Company liable to pay taxes upon fifty per cent of the value of the stock owned by it in the Central Railway of Arkansas and the Choc-

taw Investment Company; that the Central Railway of Arkansas and the Choctaw Investment Company were duly assessed according to law and paid taxes upon fifty per cent of all their assets, real, personal and mixed, tangible and intangible, and that the said fifty per cent of the value of the assets of said corporation was also fifty per cent of the market value of the stock in said corporation respectively."

(R. 15, 16.)

This decree entered as a result of the opinion and in obedience thereto was appealed to the Supreme Court again, and by it affirmed. (R. 21, 23.) This opinion, as heretofore noted, merely held that the former opinion had settled all of the questions involved. (R. 19, 23.)

THE TAXING SYSTEM OF ARKANSAS.

Instead of setting forth our various statutes and their construction, we copy at length from the State ex rel. Attorney General v. Bodcaw Lumber Company, 128 Ark. 505, which brings together all pertiment statutes on this subject, and contains their latest construction:

"It must be treated as settled that there can be no double taxation in the sense that the same property may be twice assessed for taxation. That is not contemplated by the Constitution and laws of this State. Nor does it matter, in considering the question of double taxation, whether property is doubly taxed partly in one State and partly in another, for the rule against double taxation reaches to any form, and prohibits the double taxation under different sovereignties. Wright *v.* L. & N. Railroad Co., 195 U. S. 219. Therefore, an attempt on the part of the State to tax property permanently situated outside of its borders would constitute double taxa-

tion. It has been held by many of the courts that shares of stock in a corporation may be treated separate and apart from the stock and property of the corporation itself for the purpose of taxation, and that that does not offend against the rule prohibiting double taxation. Kidd *v.* Alabama, 188 U. S. 730; Corry *v.* Mayor of Baltimore, 196 U. S. 466; Hawley *v.* City of Malden, 232 U. S., p. 1. Such, however, is not the practice under the statutes of Arkansas, which contain an express provision that no person shall be required to include in his statement as a part of the personal property, moneys, credits, investment in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State. Kirby's Digest, Sec. 6902, Act 1883, Sec. 15, p. 217. This court decided that the purpose of the law-makers in enacting the above statute was to provide against double taxation. Dallas Co. *v.* Banks, 87 Ark 484; Dallas Co. *v.* Home Fire Ins. Co., 97 Ark. 254.

"A discussion of the questions presented involves an analysis of the statutes of this State relating to the assessment of the property of corporations for taxation. There are different classifications under the statutes for different kinds of corporations. There is a separate provision with reference to banks, which requires a return to be made by the officials of the corporation, and we have decided that the scheme contemplates a taxation of the shares of stock in such corporation according to value and not of the property of the corporation itself, and that, therefore, the value of shares of stock in a national bank, when assessed for the purpose of taxation are not subject to deduction of value of property of the bank which is exempt from taxation. First National Bank *v.* Board of Equalization, 92 Ark. 335.

"The defendant is a manufacturing corporation, which falls within the general class of corporations required to make returns for the purposes of assessment in the following manner:

"Such corporation shall, through their president, secretary, principal accounting officer, etc., annually during the month of July, make out and deliver to the assessor of the county in which such company or corporation is located or doing business, a sworn statement of the capital stock, setting forth particularly:

" '*First.* The name and location of the company or association.

" '*Second.* The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

" '*Third.* The amount of capital stock paid up, its market value, and, if no market value, then the actual value of the shares of stock.

" '*Fourth.* The total amount of all the indebtedness, except the indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase on improvement of the property.

" '*Fifth.* True valuation of all tangible property belonging to such company or corporation; such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of State; and shall also show in what county such property is situated.' Kirby's Digest, Sec. 6936, as amended by act of March 11, 1913, p. 615.

"The next section (6937) provides that if the officers of the corporation neglect or refuse to make the return as required above, then 'the assessor shall from the best information he can obtain, make out and enter upon the proper assessment roll a list with the valuation of all

tangible and intangible property belonging to such defaulting company or corporation subject to taxation by the provisions of this act with 50 per cent penalty.'

"Now, the provision just quoted with reference to the method of assessment of corporation property must be read in connection with the statute already referred to, which provides that the owners of shares of stock in a corporation required to list its capital stock are not required to include such shares of stock in their personal assessments, and, when thus considered, it is seen that the legislative scheme provided is not merely to assess the property of the corporation itself, but to include the value of the shares of stock and tax them at the source. The words 'capital stock' used in the statute means the aggregate value of the shares of stock in the hands of the shareholders, though the value of the shares of stock themselves do not constitute the limit of taxation. The purpose of the lawmakers was to merge the separate valuation of the shares of stock into the aggregate valuations of the whole, and thus constitute the compound as a basis for fixing the valuation for taxation purposes, after deducting the value of the tangible property which is to be specifically assessed separately. In this way the law-makers have provided a scheme for taxation of all of the elements of value of this property one time, and only one, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders. The scheme absolutely excludes any idea of double taxation, but it does provide an adequate means of including all the elements of value contained in the shares of stock and the tangible property of the corporation itself, merged into a composite whole. The assessment of the property is in name only against the corporation, for it includes the elements that go to make up the value of the shares of stock themselves. The assessment does not include both the shares of stock separately and the aggregate whole as represented by the

capital of the corporation, for that would be double ta
ation, but the scheme does, as before stated, contempla
that all of the elements of value which will include eve
species of property involved. The two species of pro
erty, that is to say, the shares of stock held separately
the hands of the shareholders and the property of t
corporation itself, do not contain the same elements
value. The capital of the corporation is represented
its tangible assets; whereas, the shares of stock conta
only the element of market value, which may be increas
or decreased by the value of the earning capacity of t
corporation above or below the market value of the pro
erty owned by the corporation. The statute expres
provides that intangible as well as tangible values shall
taxed, and shares of stock represent the taxable intan
ible value, subject to reduction to the extent of the val
of the tangible property in the State which is taxed se
arately. If the State should tax only the tangible pro
erty in the State, it would get no benefit whatever fr
the element of value represented by the earning capaci
of the corporation and nothing in return would be rece
ed in the way of taxes for omitting from taxation t
shares of stock in the hands of the individual holde
thus creating a complete exemption of that class of pro
erty."

The details of the taxation of railroad companies is
different, but the principle is the same. Prior to 190
the assessment was made by a board of state office
The companies were required to return to this board
complete statement of all their properties in much
tail. All personal property, except rolling stock, w
required to be assessed in the county where situated, a
all real estate other than right of way was required to
assessed by the local assessor. The company failing
make these reports to the board was subject to hea
penalty. The board was required to appraise prop
ties of the railroad companies and to assess them for ta

ation according to such appraisement, and to certify out to each county its proportionate share. (Kirby's Digest, Sec. 6940-6954.) The act of May 6, 1909, transferred this duty to the Tax Commission, which was then created, but the system was not changed. The railroads were required to make their returns to the Tax Commission, and the Tax Commission, in turn, is required to appraise their properties and to assess them for taxation the same as other properties are assigned.

FEDERAL RIGHTS VIOLATED

We will present our contentions regarding the Federal questions through an illustration. In Fort Smith there are two large hotels, each located on Garrison Avenue, the principal business street of the city. They are similar properties in every respect. One, the Goldman Hotel, is owned by a corporation; the other, the Main Hotel, is owned by an individual. For a period of time a good many years ago, the real estate on Garrison Avenue, owing to heavy paving taxes charged against it, was assessed for state and county taxes on an extremely low basis in order to equalize burdens, say at twenty-five per cent of its value, and the other property in the city was assessed at fifty per cent of its value. The act under which this proceeding is framed authorizes the Attorney General to bring suit against the corporation owning the Goldman and recover of it the taxes for the period of years it was under-assessed, but does not authorize recovery for the underassessment against the similar property owned by an individual.

Our first contention (a) is that an act which thus discriminates between properties on account of ownership violates the equality and due process clauses of the Fourteenth Amendment. The State can validly classify

property for taxation and retaxation and recovery of taxes for under-valuation, but such classification must be reasonable of itself and in relation to the mischief intended to be cured. But a classification based solely on ownership, where the only difference is that one owner is a corporation and the other owner is an individual, or one owner a man and another owner a woman, contravenes the equality provision of the Fourteenth Amendment, and amounts to taking property without due process under guise of taxation, re-taxation or recovery of back taxes.

Proceeding with the illustration. Suppose the owner of each of these hotels acquires the stock in a corporation owning a cigar stand in the hotel, and each invest $10,000.00 in the stock of the cigar corporation. Then the cigar corporation would pay taxes on its property and its capital stock, that is, upon the composite value of its holdings, and the hotel owners would each pay the full amount assessed against each, which on the basis assumed was for a time twenty-five percent of the value, and now fifty per cent of the value. And this value, whether upon a basis of twenty-five per cent or of fifty per cent, included every element of value in the hotel property, whether owned by a corporation or an individual; this value would include good will, long established custom, earning capacity and everything else which would go to make up value. Upon an assessment thus made the hotel corporation should pay upon every dollar of value it owned except the stock in the cigar corporation, and not upon it because the cigar corporation would pay upon that value separately, including every element of value—the composite value. Thus the State would receive every dollar of taxes it was entitled to, and there would be equality between the corporation owner and the individual owner. But the State says, and the decree so operates, that the corporation owner of the hotel and of the shares of stock in the cigar corporation operating in it shall pay upon the value of

the cigar company's stock represented in the stock of the hotel company, notwithstanding every element of value in the cigar corporation has been assessed and paid upon, while the individual owner of the other hotel only pays upon all of the values in the hotel property excluding the cigar corporation operating in that hotel, which is paid upon by that corporation, upon all of its elements of value—the composite value.

To concretely finish the illustration with assumed values; suppose the taxable value of the Goldman Hotel, the corporation owned hotel, and the Main Hotel, the individually owned hotel, were each $100,000 and the value of all the cigar corporation stock which were all owned by the owners of the hotels were $10,000 each. These valuations included every intangible value as well as value of physical assets, so that the question of value in stock above the physical assets which was considered in the opinion of the Bodcaw Lumber Company case heretofore quoted from, is eliminated from this case under the agreed statement of facts. In the concrete examples, the corporation owned hotel and the individually owned hotel would each pay upon the $100,000 valuation, and the cigar corporations would each pay upon their $10,000 valuation, and therefore each owner would pay upon $110,000 taxable value, and every dollar of taxable value would be reached. But during the years referred to the taxable value of each hotel was placed at $50,000 instead of $100,000, and under this Act the corporation owner is subject to recovery against it for the taxes for each of these years upon $50,000, while the individual owner of the similar property is not subject to recovery for the under-valuation during those years. The cigar corporations in each of said hotels paid taxes upon their full value of $10,000 each, and the hotel properties each paid upon a valuation of $100,000, and the State has reaped taxes upon a valuation of $110,000 against each of these owners. Such was the situation until the State inter-

vened with a suit, and it caused the Goldman Hotel to be taxed $110,000, including the cigar corporation stock, although the $10,000 additional valuation had already been taxed and paid upon by the cigar corporation, thereby making the owner of the Goldman Hotel pay upon its total property upon a valuation of $120,000, while the owner of the Main Hotel property of like value and similar character is taxed only $110,000. But that is not all; for the years when the assessment of the hotel properties was $50,000 instead of $100,000, the corporation owned hotel must pay upon a valuation of $100,000 for the hotel for each of those years and $10,000 for its cigar company's stock, although that cigar company stock had paid upon its $10,000 for each of the years, thereby receiving taxes against the corporation owned hotel including the cigar property on a basis of $120,000 for each of these years, while the individually owned hotel including the cigar corporation only paid upon $60,000, thereby during that period the corporation owned hotel would pay upon a valuation of $120,000 as against $60,000 valuation of the other similar property by reason of the difference in corporate and individual ownership and a mode of assessment against corporations requiring duplicate taxation to the extent shown.

(b) It discriminates against the corporate owner of the stock in the cigar company operating in the Goldman Hotel and requires it to pay twice, once through the cigar corporation and once through the hotel corporation upon the same $10,000 of property owned by it, when that amount represents the composite value of the shares of stock and of the assets of the corporation, while it only requires the individual owner of similar property, operating in the other hotel to pay once upon it, and that through the cigar corporation alone. In other words, a different burden is placed on stockholders in corporations depending solely on whether the stockholder is a corporation or an individual.

(c) The corporation owner of the Hotel Goldman is required to pay upon the value of its assets including the shares of stock owned in the cigar corporation, and the cigar corporation is also required to pay on the value of its assets, and in each of these values is the value of the shares of the stock and of the assets, that is the composite value, while an individual owning similar property is only assessed upon their composite value once, part of it directed against the hotel property and the other part against the cigar corporation; thus a duplicate burden of taxation is placed on corporations which is not placed on individuals owning the same class of property. In other words, this hotel corporation is required to duplicate its taxation to the extent of its holding in stock of the cigar corporation, when every element of value, that is, the composite value in each corporation is assessed and paid upon. In a way these are the same proposition, but in other ways they are different. Proposition "a" goes to the validity of an act which classifies property between corporation owners and individual owners, and authorizes recovery for back taxes against the one, but not against the other. Proposition "b" goes to the assessment and taxation of stockholders in corporations which requires the corporation stockholder to pay twice upon value owned by it, once in the corporation owning the stock, which must include in its assessment the value of the shares of stock owned in another corporation, and again requires that other corporation to pay upon the value of its shares and property, then to the extent of the value of those shares and property in the stock of the holding corporation is duplicate taxation upon that much value and is discriminating between the corporation shareholder and the individual shareholder.

Proposition "c" goes to the inherent wrong to duplicate taxation of one class of property—corporation owned shares. This duplicate taxation being worked out, under the decree appealed from, by assessing all of the as-

sets of the sinning corporation, including its shares of stock in another corporation, at the composite value of all of its stock and property without deduction of the shares or the property in the other corporation, whose shares the sinning corporation owned, though this other corporation has been assessed and paid taxes upon the full value of its shares and assets, its composite value.

In some states double taxation is permitted, and this court has held that for that reason alone a Federal right is not involved, where the taxation scheme falls alike on all property without discrimination. But the Constitution of Arkansas, as construed by the Supreme Court in the Bodcaw Lumber Company opinion heretofore quoted, forbids double taxation, therefore any system of taxation under such constitution which would require taxation of a corporation owner of corporation shares and single taxation of an individual owner of such corporation shares is necessarily a denial of the equal protection of the law. That system of taxation worked out by this decree, i. e., taxing the full value of the stock of the Lumber Company, including therein the value of the stocks owned by it in the Railway Company and Investment Company, which were separately assessed and taxed, is duplicate taxation, forbidden by the Constitution of Arkansas, and it was so decided in effect in Hempstead County *v.* Hempstead County Bank, 73 Ark. 515. The bank was required by the statute to return for assessment its various properties, but this statute did not enumerate real estate, but by another statute real estate was required to be locally assessed. The statute regulating the taxation of banks required in detail a statement of their assets, liabilities, etc., and the value thereof, and the stock, and required a separate valuation to be returned which truly represented the condition of all the assets to the end that the sum of these items should be the valuation for taxing purposes. This bank had $35,000 of capital paid in and $1,243.77 undivided profits, and from these sources in-

vested $9,777.22 in real estate. The real estate was separately assessed and paid upon. The bank returned all of its property properly valued and took therefrom the real estate, because it was separately assessed. The county objected to this deduction. The trial court allowed it. The Supreme Court said:

"To hold the capital stock to be taxable to its full face value, when that stock is represented in whole or in part by real estate taxed separately, would not be taxing the property according to its value, and would result in a double taxation, to the extent that the capital stock was invested in real estate, and that is not an intent to be imputed to the General Assembly. Judge Cooley thus treats the subject: 'The same may be said of a tax on the property of a corporation and also on the capital which is invested in the property; if the latter is taxed as property, this is also duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value when on the same basis it is taxed as a part of his general property. When, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital, and to tax the capital as valuable property distinct from that which then represents it would be to tax a mere shadow; it would be to make the shadow stand for the substance in order that it might be taxed, when the substance itself is taxed directly under its own proper designation.' 1 Cooley on Taxation (3 Ed.) pp. 396, 397. See also the many authorities cited in the notes.

"The State is entitled to taxes on the true value of all the assets of the bank once, and no more. To tax its capital stock to its face value, when part of it has been withdrawn and put into real estate, which is separately taxed, would be to tax twice the value of the real estate, and this is not the intention of the taxing system devised by the Constitution of 1874, and not within the spirit of

the statutes. The circuit court was therefore right in deducting the value of the real estate from the capital stock, and the result is that the bank pays once on the true value of all its assets."

If the failure to deduct the value of real estate in which part of the capital stock is invested, and the value of the capital stock assessed when the real estate was separately assessed, constitute double taxation, by the same token the failure to deduct the value of shares of a corporation's stock in which part of the capital stock was invested from the value of the capital stock to be assessed, where the value of the purchased corporation shares were separately assessed, is double taxation, forbidden by the Constitution of Arkansas. Yet this decree works out this double taxation as to corporation shareholders, but otherwise as to individual shareholders.

We will present the authorities sustaining our contentions under each head separately

(a) Taking first the validity of the act under which this proceeding is brought: We cannot improve upon the reasoning of Mr. Justice Wood, who dissented from the opinion of the court sustaining said act in State vs. K. C. & M. Ry. & B. Company, 117 Ark. 606, which dissenting opinion on this subject is part of his concurring opinion in State vs. Bodcaw Lumber Company, 128 Ark., beginning at page 522. That opinion is as follows:

Justice Wood's Dissenting Opinion

"The conclusion reached by the majority of the court, it seems to me, is the only logical result to follow, conceding, as I do, that the act is now a valid law. However, in view of the far reaching consequences that it may have, I have concluded, while my mind is on the statute, to record here my views as to the constitutionality of the

United States, which prohibits the State from denying to any person the equal protection of the laws. 1 Cooley on Tax. 72, et seq., 83; Judson on Tax., pp. 594, 606, 608, 618.

Such I understand to be the law as announced not only by the ablest authors of text books on the subject of taxation, but also by the State courts of last resort, and by the Supreme Court of the United States, where the question has arisen in the latter court, under State Constitutions having an equality and uniformity clause similar to ours. State *v.* Loomis, 115 Mass. 307, 314; Russell *v.* Croy, 164 Mo. 69; South & North Alabama Railroad *v.* Morris, 65 Ala. 193, 199; Santa Clara Co., *v.* So. Pac., 18 Fed. R. 385; North Pac. Ry. Co. *v.* Walker, 47 Fed. R. 681; County of San Mateo *v.* S. Pac. Ry. Co., 13 Fed. 145, 150; Gulf, C. & F. Ry. Co., *v.* Ellis, 165 U. S. 155; Bell's Gap Rd. Co. *v.* Pennsylvania, 134 U. S. 232, 237; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 560; Bradley *v.* Richmond, 227 U. S. 477.

In Fletcher *v.* Oliver, 25 Ark. 289, 295, we said: "Taxation by uniform rule means by one and the same unvarying standard; uniformity not only in the rate of taxation, but uniformity in the mode of assessment by which the value is ascertained. There must be an equality of burden." In Ex parte Fort Smith & Van Buren Bridge Co., 62 Ark. 461, we said; "When the property of a few is taxed according to its value and of all others at one-half its value, then the few are required to contribute double their proportion of the burden. This is manifestly wrong, and justice demands that it be redressed whenever it can be done in conformity to the laws."

Legislation for the collection of "back taxes" which seeks to lay the burden of paying those taxes upon only one class of tax-payers, while exempting all others, without any reason for such discrimination other than that the one class consists of corporations while the other is

93

natural persons, is equally as obnoxious to the equality clause of our Constitution as would be legislation making the same classification for the original assessment of taxes. The effect of such legislation in either case is to lay the burden necessary to meet the expense of government upon one class of property owners, while exempting others based upon no other reason than a mere difference in ownership and in names of owners. Such legislation, in its last analysis, is but a flagrant discrimination against individuals who may have associated themselves according to law and for lawful purposes in order to transact their business in a common name by which the corporation is designated, and in favor of individuals who may transact precisely the same kind of business as natural persons without a corporate name. To illustrate, the Sunnyside Planting Company is a corporation engaged in the business of producing cotton in Chicot county, Arkansas. It owns two thousand acres of land in that county which is used for that purpose, it has failed to pay taxes on such lands for fifty years. Suppose John Jones has also two thousand acres adjoining the lands of the corporation, precisely the same character of land and used for the same purpose. He, too, has failed to pay taxes on his land for fifty years. Or say each of these taxpayers has had on hand each year during all these years one hundred mules, ten thousand in money or other of the same kind of personalty which they have failed to return for taxation. Can any reason be suggested why a law should be enacted compelling the corporation to pay these back taxes and expressly exempting John Jones from liability therefor? Yet such is the effect of the statute under review. See Wolff Chem. Co. *v.* City of Philadelphia, 66 Atl. 344, 217 Pa. 215; United States *v.* Milwaukee Refrig. Tr. Co., 142 Fed. 247.

The mandate of our Constitution requiring taxes to be equal and uniform forbids legislation that makes "fish

of one and flesh of another" taxpayer who both stand in precisely the same relation to the government as to their taxpaying duties. The act makes no attempt to classify as to any particular corporation or special kind of property that might furnish fit subjects for classification. It is but a bald discrimination between corporations in general and natural persons. Of course, when the sovereign power is fair and just, making no arbitrary and oppressive discrimination in the law itself by which it seeks to compel delinquent taxpayers to bear their proportion of the burdens of taxation, then, if by reason of defective administration of the law one delinquent is caught while another escapes, "it does not lie in the mouth of the one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

In the recent case of State ex rel. *v.* K. C. & M. Ry. & B. Co., 117 Ark. 606, this court to sustain its view that the act was valid, cited and relied principally upon Weyerhaeuser *v.* Minnesota, 176 U. S. 550, and Florida Cent., etc., Rd. Co. *v.* Reynolds, 183 U. S. 471.

In the Minnesota case the legislation arose under a statute which operated alike upon all taxpayers. There was no classification, hence no discrimination on the part of the sovereign by which one class of delinquents, to-wit: corporations, could be made to pay while another class of delinquents, to-wit: individuals, who stood in precisely the same attitude as to the duty to pay taxes, was exempt.

The Florida case arose under a statute which provided for the collection of taxes "upon any railroads and the properties thereof for the years 1879, 1880, 1881." Here was a classification which all the authorities recognize as perfectly legitimate and reasonable for taxation purposes.

As is well expressed by Judge Caldwell, speaking for the court, in Northern Pac. R. C. *v.* Walker, 47 Fed. R. 681, "The franchise of the railroad companies, and their earnings, and railroad property, may well be classed by themselves for purposes of taxation and taxed by a different method or rule from that applied to other property." Of course, all that is said in the opinion of the above cases must be interpreted in the light of the facts upon which the opinion is based. The Constitution of Florida is unlike ours in that it provides only "for a uniform rate of taxation." Not only was it reasonable that railroads should stand in a class by themselves, but the act specially mentions the years that such railroad had escaped such taxation. On this feature of the act the court said: "A wrong intent can not be imputed to the Legislature. It may have found that the railroad delinquent tax was large" (for three years) "and the delinquent tax on other property was small and not worth the trouble of provision therefor." But it could hardly be said of the act under review that in 1913, when the Legislature made the act apply solely to corporations by striking out persons it did so for the reason that it found that corporations, during all the years they had been allowed to do business in this State, had been delinquent in the payment of taxes while individuals had not. The very fact that the Legislature, for all this long period, made a discrimination against corporations shows a deliberate purpose to cast upon them an unequal burden of taxation. Speaking of the effect of the Fourteenth Amendment on such a state of facts, the court further said: "Doubtless it would prohibit a State from selecting some obnoxious person and casting upon his property the sole burden of taxation, or a burden differing from that case upon others where property was similarly situated, but it does not prevent a State from exercising its judgment as to the property to be taxed and the modes of tax-

ation, providing all property similarly situated is treated in the same way."

Therefore, I am unable to see how the Minnesota case and the Florida case, supra, have any application or give any support to the view that the "Back Tax" Act of 1887, as amended, is a valid enactment. As I stated in the beginning, the act shows on its face that it is in plain violation of the "equal and uniform" clauses of our Constitution, and, being so, is also in plain violation of the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States."

Other Cases Reviewed

That arbitrary classification of property for taxation is protected by the Fourteenth Amendment is established by the following excerpt from the opinion of this Court in Bradley vs. Richmond, 227 U. S. 477, to-wit:

"But this ordinance does not authorize any arbitrary classification, nor could the State or the Council legally confer or exercise arbitrary power in classifying for the purpose of either regulating or licensing or taxing. The guaranty of the Fourteenth Amendment would forbid."

The leading case considered by the court in the Memphis bridge case (117 Ark. 606), which dealt with a back tax statute was the case of Winona & St. Peter Land Company vs. Minnesota, 159 U. S. 526, and we respectfully submit that the court misconstrued that opinion. The statute of Minnesota providing for the recovery of back taxes reached to all classes of property, irrespective of ownership, which had been undervalued, but there were practical difficulties which it was claimed rendered it ineffective against personal property. The Supreme Court of Minnesota held that the fact that it was not in fact enforcible against personal property did not render it ineffective against real estate. In other words, there could have been a classification of property between per-

sonal and real, and if each in its own class was treated alike the classification would not have been arbitrary. There is nothing in the decision of this Court which tends to sustain a classification of property based upon ownership alone. On the contrary, the clear inference to be drawn from the opinion is exactly the reverse, as shown by the following quotation:

> "For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that." Winona & St. Peter Land Co. v. Minn., 159 U. S. 526.

This act is not aimed at those accidents which may happen under any taxing system, in consequence of which here and there some item of property has escaped its just burden, but is aimed at only that class of property which has escaped its burden when it is owned by a corporation and permits like property owned by an individual, which has likewise escaped its just burden to have sanctuary in the assessor's office, because owned by an individual instead of owned by an organized group of individuals. The taxing statutes of Arkansas provide that the word "person" therein "shall be held to mean and include firm, company and corporation." (Kirby's Digest Sec. 6872). Thus equality of taxation is provided between individuals and corporations, but that equality ceases where there is an undervaluation of either corporate or individually owned property. The undervalu-

ation must be made good by the corporation, but not by the individual. This act is proceeded under herein as more than a recovery for undervaluation of corporate owned property, and operates as a mode of assessment of corporation owned property different from individually owned property.

Suppose that instead of the Lumber Company owning the shares of the stock of the Railway Company and the Investment Company, Mr. C. W. Jones, its manager, owned them. He is not required to assess them, because each of these corporations are required to assess the value of their assets and stock and pay upon the same. Therefore the tax upon the value of his stock is paid at its source, and he is only liable to the corporation, not to the State, for the taxes on his stock. But this act, as operated, requires the Lumber Company, because it is a corporation, to assess and pay upon shares of stock owned by it in the Railway Company and Investment Company, although each company has paid upon it, and the Lumber Company owes them the amount of taxes they have paid on the stock owned by it. Wherefore, this act as operated requires a corporation owner to assess shares upon which it has already paid (or owes) for years in the past, while the individual owner of such shares has no such burden cast upon him, This is done under the guise of undervaluation of the stock of the Lumber Company. But it is not an undervaluation; it is a double assessment and taxation of the same value due to the difference only in ownership and operates only where that owner is a corporation. Such a statute is far beyond those sustained in cases relied upon by the majority of the Supreme Court of Arkansas in its opinion sustaining the act in the Memphis Bridge case. (117 Ark. 606.)

(b) A statute of Kentucky provides that "all corporate property should pay the same rate of taxation

paid by individual property." The same effect is produced in Arkansas by Section 6872 Kirby's Digest, providing the word "person" as used in the Revenue Act shall be held to mean and include corporations. Considering a case arising under this statute in Kentucky, this Court adopted a statement of the principle from the Ohio court which had theretofore been quoted with approval by this Court, to-wit:

> "Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity of the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." Greene v. Louisville & I. R. Co., 244 U. S. 499.

Therefore, there must be uniformity in the mode of assessment, and a mode of assessment that requires a corporate stockholder to have his property assessed twice, once in the corporation owning the shares of stock and once in the corporation issuing those shares of stock, is a different mode from that required of an individual stockholder who is assessed only once through the corporation which issues the shares. Therefore this mode of assessment which is pursued in the decree, is in violation of the uniformity requirement as construed by this Court.

(c) The mode of assessment which requires a corporation to pay taxes upon corporation shares which have in them taxable value derived from ownership in shares of another corporation, which other corporation is by law required to separately assess and pay taxes upon the value in those shares, is duplicate taxation, inimical to the equality and due process clauses of the Fourteenth Amendment. These cases we think so decide:

Ind. Ter. Ill. Oil Co. v. Oklahoma, 240 U. S. 522.

Deleware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341.

Louisville & Jeffersonville Ferry Co. v. Commonwealth of Kentucky, 188 U. S. 385.

There was an apparent confusion of cases taxing corporate stock of non-residents and corporation stock for value represented beyond the State of taxation, but those cases do not go to the point of holding that property may be taxed in the State twice in the shape of corporate stock or otherwise. In Kidd v. Alabama, 188 U. S. 730, the court said:

> "We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned."

In the case at bar the property is not taxed elsewhere, but is taxed in Arkansas to full measure. In Hawley v. Malden, 232 U. S. 1, the Court said that the real grievance there was the same as in Kidd v. Alabama. It was not that the shares are taxed in one place rather than another, but they are taxed at all, when presumbably the property and franchises which gave value to the shares were taxed elsewhere, but the court held that that did not render the tax void as unconstitutional. But certainly when that value is twice taxed in the same jurisdiction it would necessarily be duplicate taxation and void as offending the equality provision when it forbids duplicate taxation of other classes of property.

In Indian Territory Illuminating Oil Company v. Oklahoma, 240 U. S. 522, the oil company owned some leases, which were exempt from taxation by virtue of an Act of Congress. An effort to tax these leases in the guise of value of the stock of the corporation, was held unavailing. The court said:

> "A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did. The assessment by the Board was of the leases as objects of taxation, having no immunity under Federal law. This was repeated by the referee, and he made it clear that the assessment was so constituted. . . . . It is manifest, therefore, when the court took the stock as evidence of the value of the property of the company the court took it as evidence of the value of the leases, and thereby justified their assessment and taxation. This, for the reasons we have stated ,was error.
>
> "It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid."

This whole subject is concluded, as we view it, by the following excerpt from Delaware L. & W. Co. v. Pennsylvania, 198 U. S. 341:

> "We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo nomine*, or specifically, when outside the state, and a tax assessed against the corporation upon the value of its capital

stock to the extent of the value of such property and and which stock represents, to that extent, that very property. If the property itself could not be specifically taxed, because outside the jurisdiction of the state, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property, and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock, or something else which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

There can be no difference in principle between adding value to corporation stock through increasing it by means of adding the value of property out of the jurisdiction, or exempt from taxation, and adding to it by adding value of property already taxed in another form, which is as sacrosanct to taxation again as if out of the jurisdiction or exempt.

This is only done where the owner is a corporation, which makes it offensive to the equality clauses as well as the due process clause.

THE BANK OF CALIFORNIA v. RICHARDSON

This case decided by this court on January 27, 1919, is so clearly analogous to the case at bar that a comparative analysis is thought to be worth while. The Bank of California was a national banking association, although it does not so appear in its title. It was a stockholder in the D. O. Mills National Bank and in the Mission State

Bank, the former being a national banking association and the latter being a California state banking association The laws of California provide, except as to the real estate which is taxable directly in the name of the bank, that all of the available resources of the banks for the purpose of taxation are reached by an annual assessment and tax made by the State Board of Equalization against the stockholders. The State places the duty upon the banks to pay the taxes assessed against their stockholders with the obligation on the stockholders to repay, sanctioned by a right conferred upon the banks to sell the stock of any stockholder failing to refund. The taxing scheme against banks is the same as that in Arkansas as defined in First National Bank of Batesville vs. Board of Equalization of Independence County, 92 Ark. 335. The facts in this case were as follows:

The Bank of California had eighty-five thousand shares of stock. The Board of Equalization fixed the value of all of the assets of the bank at $15,775,252.67. The California Bank owned 2501 shares of stock in the Mills National Bank, which the Board found to be of the value of $625,546.30, and the California Bank owned 1001 shares of stock in the Mission Bank, which the Board found to be of the value of $121,916.50. These valuations of the stock in the Mills National and in the Mission State Banks were included in the $15,775,252.67, the valuation for the assessment of the stockholders of the California Bank. The Board assessed taxes against the shares of stock of the California Bank on the basis of the valuation of $15,775.252.67. In addition thereto it assessed a tax directly against the California Bank as a stockholder in the Mills National based on the aforesaid valuation of the 2501 shares of stock owned by the California Bank in the Mills National and it assessed a tax directly against the California Bank as a stockholder in the Mission State Bank based upon the aforesaid valuation of its 1001 shares in that Bank. The California

Bank paid the taxes under protest and brought a suit against the State Treasurer for a refund of the taxes levied against it as stockholder in the Mills National and in the Mission State Banks. The Supreme Court of California denied it the relief prayed and it obtained a writ of error, and these were the questions decided by this Court, on January 27, 1919. Section 5219 of the Revised Statutes, which was construed by the Arkansas Supreme court in the Batesville case, was construed by this Court in the same way; the effect of the holding being that the capital stock of a national bank is exempt from state taxation and the assets of the bank are exempt from state taxation (except real estate, which is separately provided for, and which will not be considered here,) but that the shares of stock in a national bank are subject to state taxation, and that all assets of the bank are to be considered in determining the value of the shares of the the stock. In the instant case the assessment was made against the bank at its own request instead of being assessed in the names of the individual stockholders. Therefore, the question over which there has heretofore been litigation of a tax directly against a bank as such was not involved.

Before considering this case it is well to call attention to two previous decisions. In National Bank vs. Boston, 125 U. S. 60, it was held by the Court that stock owned by one national bank in another national bank is subject to the state power to tax stockholders as provided in Section 5219 Rev. Stat. In other words, that section confers upon the State the right to tax stockholders in national banks the value of their stock owning therein and it applies to national bank as a stockholder in another national bank just as it applies to an individual stockholder in a national bank .

In Owensboro National Bank vs. Owensboro, 173 U. S. 664, the Court held that under Section 5219 a state had no right to tax the assets (except real estate) of a national bank, in that particular instance, a franchise. The principle was deduced that the assets of a national bank as such were not subject to state taxation, and that the limit of state taxation was a tax against shares of stock in said bank.

The Supreme Court of California decided that as the California Bank as a stockholder in the Mills National Bank was subject as such to state taxation, that under Section 5219, providing that no different rule of taxation could be worked out by a state between national banks and other banks, that it was likewise taxable as a stockholder in the Mission State Bank. The California court sustained the assessment against the California Bank stockholders for the valuation of $15,775,252.67, including therein the valuation of the stock in the Mills National of $635,546.30 and the valuation of the stock in the Mission State Bank of $121,916.50, and sustained in addition thereto a tax directly against the California Bank on account of its ownership of the aforesaid stock in the Mills National, on the assessment value of $635,546.30; and similarly an additional tax based upon the valuation of the stock of the Mission State Bank of $121,916.50.

Necessarily the California court had to meet the proposition that this was double taxation to the extent of the value of the stock in the Mills National and the Mission State banks. The court pointed out that it was contended on the one side that this was double taxation and on the other side that it was not in reality double taxation, as one tax was imposed upon the bank and the other upon the stockholders. But the court did not seem disposed to decide these contentions, and stated: "Let it be assumed that the assessment here complained of did result in double taxation."

Bank of California vs. Roberts, 173 Calif., 398; same case, 160 Pac. 225.

The court held that the Constitution as it stood prior to the amendment of 1910 did contain a prohibition tantamount to forbidding double taxation, but held that an amendment thereto authorized the legislature to devise a taxing system that would permit double taxation, and that under the system devised that the double taxation occurring in this case was not prohibited by the amended California Constitution. This in striking contrast to the system in Arkansas, concerning which the Chief Justice said in State vs. Bodcaw Lumber Company, 128 Ark. 505:

> "In this way the law makers have provided a scheme for taxation of all of the elements of value of this property one time, and only once, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders. The scheme absolutely excludes any idea of double taxation."

It will be noted from the statement of facts in the California case that the issues there are identical with those at bar. The Bank of California as a stockholder in the Mills National and in the Mission State Bank was assessed the full value of the stock owned by it in those banks, and in addition thereto the stockholders of the Bank of California were assessed the full value of their stock, including in that value the value of the stock owned by it in the Mills National and in the Mission State Banks, thereby making a twofold tax against the value of the stock in the Mills National and in the Mission State bank, once directly against the bank, and once in the value of the stock of the bank. So, in this case, the Fort Smith Lumber Company is by the decree herein assessed with full value of all of its assets and stock, including in the value of said stock and assets the stock owned by it in

the Central Railway of Arkansas and the Choctaw Investment Company. The assessment here decreed against it in this respect is identical with the assessment decreed against the stockholders of the California Bank. In addition to the assessment against the Fort Smith Lumber Company based upon the total value of its assets reflected in its stock, including the Railway and Investment Company stock, there was levied a tax against both the Railway Company and the Investment Company for the value of their respective assets, which value was reflected in the stock of said corporations. In this respect the separate assessment against the Railway Company and the Investment Company was identical with the separate assessment against the Bank of California of the value of its holdings in the Mills National and the Mission State Banks. In each case there is, to the extent of the value of the stock owned by the holding corporation, a double taxation, of those stocks once in treating them as an integral part of the value of the shares of the holding company or the capital stock of the holding company, then in the other instance the separate tax against each of the subsidiary companies to the extent of the value of its stock, notwithstanding its inclusion in the value of the shares of the holding company or the capital stock of the holding company. In each instance there was a theoretical difference between the assessment of the tax, one an assessment against the Bank of California as a stockholder in the subsidiary companies, and the other against the shareholders of the Bank of California, including the value of the shares of the stock in the subsidiary companies; and in this instance an assessment, as awarded by the decree, against the Fort Smith Lumber Company of the full value of its assets and stock, including its stock ownership in these two subsidiary companies notwithstanding the full value of those companies had been assessed against them at their source rather than against the individual stockholders therein, under our

taxing system. The principles are necessarily the same, and the facts so analagous that no distinction can be drawn between them.

This Court decided that such double taxation could not be sustained, and considered each tax separately, as they were governed by different principles. Regarding the stock owned by the California Bank in the Mills National Bank, it was held, as previously decided by that court in the Boston case, that the bank as a bank was amenable to that tax as a stockholder in the Mills National under Section 5219 of the Revised Statutes, and that the State Board of Equalization proceeded correctly in so assessing it. But the court held that the inclusion of the stock ownership of the California Bank in the Mills National as an asset of the California Bank for the purpose of taxing the stockholders of the latter bank was a disregard of the provision as to taxing stockholders fixed by said statute. The court said that the use of the power conferred by that statute on the State to tax the California Bank as a stockholder in the Mills National, and in addition to avail of such stock ownership for the purpose of taxing the share holders of the California Bank was but to accept the statute on the one hand and to exert on the other a power which could have no existence consistently with the statute. The Court said:

> "To say that the two taxes, the one levied on the bank as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank, on the one hand, and the stockholders of the California Bank on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question."

The same reasoning applies here. To say that the two taxes levied, one on the value of the capital stock of

the Fort Smith Lumber Company, including in that value the value of the stock owned by the Lumber Company in the Railway Company and the Investment Company is valid because a taxation of different persons, the Railway Company and the Investment Company already being taxed as such, serves to emphasize a plain disregard of the Constitution which is construed by the Supreme Court of Arkansas as authorizing a taxation once and only once against the value inherring in the capital stock of any corporation. This further expression of the court on this point is peculiarly appropriate here:

> "We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute, and which was the sole measure of the state authority."

Certainly under our taxing system the sole measure of the State is to tax once just as under the Federal statute the whole measure under 5219 is to tax once. And the court thought, when it was found that taxation had been made twice against the same value under the one power, merely because that value was represented in two entities, was a sufficient answer to the futility of the State to do so. Mr. Justice Pitney wrote a dissenting opinion, which was concurred in by Justices Brandeis and Clarke, and he makes even more clear, if it is possible, the thought of the court on this subject than these quoted excerpts from the opinion of the Chief Justice. He says:

> "The opinion seems to adopt the view that to treat the Mills National shares as assets of the California National Bank amounts to imposing a 'two-fold tax,' a 'double burden' or 'two taxes' upon a single property interest. But if there are two taxes it is only because there are two banks, the stock in

each of which is valued separately because the ownership is separate and distinct."

He then follows with his reasoning for sustaining the California court in this double taxation on the indicated theory that there were two banks, the stock in each of which valued separately because the entities were separate and distinct. This reasoning would not be applicable here because the Constitution forbids double taxation, as the California Constitution did not, and hence any system of taxation worked out against one class of taxpayers (corporations) offending against double taxation would be a denial of equality to those taxpayers.

The majority of the court reached the conclusion that the assessment of the Bank of California as a stockholder in the Mills National Bank was correct, but the inclusion of the value of the stock of the Mills National in the shares of the Bank of California was wrong, and that the same must be deducted from the valuation assessed against the shares of the California Bank. This procedure was exactly the way the taxing officials treated the Fort Smith Lumber Company, and which this Court says should have been done. The taxing officials valued the capital stock and assets of the Lumber Company at their full measure of taxation and deducted therefrom the value of the stock owned by it in the Railway Company and in the Investment Company, because they had been separately taxed, but the decree herein requires in addition to such assessment, that these values also be included in the valuation of the capital stock and assets of the Lumber Company, just as the California court held that the valuation of the stock in the Mills National Bank be included in the value of the capital stock of the California Bank, notwithstanding its assessment against the bank itself as a stockholder therein.

Regarding the tax against the California Bank as

a stockholder in the Mission State Bank, a different consideration brought the same result. The court held following the Owensboro case, that the California Bank could not be assessed as such for any of its assets except as ruled in the Boston case,—its stock in another national bank,—and therefore the State of California was without the power conferred in Section 5219 to assess it for its ownership of stock in a state bank. The court held further that the ownership of this stock in the state bank was a part of the general assets of the California Bank, and its value must be taken in consideration in ascertaining the value of the stock of the California Bank. Justices Pitney, Clarke and Brandeis concurred with the majority of the court in regard to this matter, and Justice Pitney thus stated the situation in regard to this stock in the following language:

> "The nontaxability of state bank shares in the hands of a national bank is attributable to the character of the national bank as a taxpayer, not to the quality of the state bank shares as an object of taxation."

Therefore, we have this situation: The Mission State Bank was under the laws of California not taxable itself, but the value of its shares was taxable in the hands of their holders. But in this instance the holder was a National Bank which was not amenable as such as a taxpayer. Therefore there was no taxation either against the individual stockholders therein, under our but this stock was an asset of the California Bank, and gave value to the stock of the California bank, to the extent of its value, the stock of the California bank was taxable in the hands of its share holders. Necessarily, then, that value must be included in the general assets of the Bank of California, and it would be taxed as reflected in the value of the shares of that bank. In this way

the State would gather its taxes once and not twice on this value.

In the first opinion in this case the court said:

> "Nor does this construction of the statute operate as a discrimination against a corporation and in favor of individual owners of shares of stock. The capital stock of a corporation has its own value. It is assessable as such for taxation, and the failure to deduct investments in shares of stock of other corporations does not constitute double taxation. The two elements of value are separate and distinct, for the shares of stock themselves are not assessed for taxes."
>
> State ex rel, Attorney General v. Fort Smith Lumber Co., 131 Ark. p. 43.

This is untenable, because the answer which was then under consideration alleged "which assessment is equal to or in excess of the value of the corporate stock on a fifty per cent basis." (R. 7). (The assessments in Arkansas were all on a fifty per cent basis instead of a one hundred per cent basis (R. 7 and Agreed Statement of Facts pp. 13, 14.)

On the second appeal this statement has even less basis, for the agreed statement of facts stipulates:

> "That each year the Central Railway of Arkansas was assessed fifty per cent of the true market value of all of its assets, real, personal and mixed, and including tangible and intangible property and that said assessment of fifty per cent of the true market value of its assets was also fifty per cent of the true market value of the stock of said Central Railway of Arkansas."
>
> (R. 13).

And similarly as to the Investment Company. Record p. 14. Hence there is no room in this case for the application of the theory that there were two distinct elements of value, one in the stock and the other in the assets, and being different, one greater or less than the other. This was discussed by the court in the last opinion. (R. 23). It was held that it was also decided in the former opinion in the following excerpt taken therefrom:

> "Of course, it would constitute double taxation as was said in the Dallas County case, to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations."

This was evidently on the thought of a possible difference in value of stock and value of assets which is nonexistent in this case, or it was on the thought of the separate entities of the two corporations. If upon the latter theory it is met by this statement from this court in the case under consideration, to-wit:

> "It is undoubted that the statute, from the purely legal point of view, with the object of protecting the Federal corporate agencies which it created from state burdens, and securing the continued existence of such agencies despite the changing incidents of stockownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank, as one, and subject to one taxation by the methods which it provided."
>
> Bank of Calif. v. Richardson, U. S. Adv. Sheet March 1, 1919, p. 215.

As the Arkansas Supreme Court has held double taxation forbidden and decides in the excerpts quoted that it is double taxation to tax the shares of stock in the Railroad Company and the Investment Company owned by the Lumber Company and also the entire capital stock of the Lumber Company, there can be so far no difference in the construction of this Federal statute by this court, and the system in Arkansas as construed by that court, and the separate entities are disregarded by each and the real facts considered, and in each instance it is held not permissible to double the taxes on account of the separate form of the same properties in the same ownership. Yet, in the face of that ruling, the Supreme Court of Arkansas concludes:

> "But the failure to deduct the value of such shares of stock is not tantamount to assessing the shares of stock in the other corporation."

It is difficult to understand this conclusion in the face of what precedes it. But if it means that the value of the shares must be assessed by the Lumber Company and that value exempt in the Railway Company and Investment Company, it is directly in teeth of the decree which it affirms, which decree assesses the Lumber Company for the entire value of its capital stock, including the stock owned by it in the Railway Company and Investment Company, although that entire value had been assessed and paid upon by those companies. Therefore, if such principle was applicable, it could not be in the face of the decree directly opposed to the principle announced. Moreover, this could not be the thought of the court, because if it was it would be directly in the teeth of the statutes of the State. The statute heretofore quoted (Sec. 6936 Kirby's Digest) requires the corporation to make a return to the assessor and set forth therein the shares of stock and their market, or actual, value, and the true val-

ue of all tangible property. Thus the assessor obtains all value, both tangible and intangible, one in the assets, the other in the stock. The next section provides that if the corporation fails to make this report the assessor shall make an assessment of all tangible and intangible property, and add thereto for the failure to make the return, a penalty of fifty per cent. Thus, if the Investment Company had claimed as exempt the value of its assets represented by the shares of stock held by the Lumber Company because assessed by it and refused to make the report, nevertheless the assessor is required to assess that value, tangible and intangible, the same as if it had been reported, and the only difference would be that the company would be penalized for not voluntarily doing it.

As heretofore set out, railroad corporations must make returns to the Tax Commission, and the statute provides that false information therein is made perjury, and the Tax Commission having reason not to believe the reports or any part thereof, or on failure to make the reports, it is made the duty of the Tax Commission to resort to other information and assess the total value of the property.

Act of 1909, Kirby & Castle's Digest, Secs. 8556-8557.

Therefore the Investment Company and Railroad Company could not escape making their respective returns and could not escape taxation even if they incurred the penalties for failure to make the returns, as it is made the bounden duty of those taxing officials to assess their whole property, tangible and intangible, irrespective of whether or not they make the return. Therefore, this concluding sentence of the opinion could not mean that the Investment Company and Railroad Company stock owned by the Lumber Company was not to be returned or assessed by those companies, as that is

directly in the teeth of their duty and of the officers' duty, and it evidently meant, as shown from the preceding discussion, that this value must not be deducted from the Lumber Company's assessment, because of the two entities in holding, or the two values, one in the stock and the other in the assets, which is non existing in this case, and that brings these opinions squarely in conflict with the case under consideration.

It is apparent that it is not the form of the deduction but the fact of the deduction that the court rules against. It is seen from the opinion of the Bodcaw Lumber Company case heretofore copied that the court recognizes as right a deduction from taxation of the holding company of property which is separately assessed in this State. And in the Hempstead County case heretofore quoted, such a deduction was authorized and emphasized. Therefore the Lumber Company and the taxing officials proceeded appropriately in applying the principle of the Bodcaw Lumber Company case and the Hempstead County case in deducting from the total assets the value of the stock of the Investment Company and Railway Company, which were separately assessed. That was a fixed quantity in the assets just as the real estate was in the Hempstead Bank case, and there were no complication in the deduction. On the other hand, these statutes level an assessment directly against the Railway Company and the Investment Company for the composite value of the assets and stock, and there could be no deduction there on account of the shares being owned by corporations or individuals. The assets are owned by the company and the stock by the other company, and the assessment goes against the company irrespective of the ownership of the shares.

While we confess inability to clearly understand the concluding paragraph of the opinion of the court on the last appeal, yet we can not impute to it an interpretation

that it means that the stock should be deducted from the Railway Company and the Investment Company assessment and taxed in the Lumber Company, because that would be contrary to the statutes, whereas ,the other deduction would not, and there is nothing in the discussion in either opinion that would lead to such a thought. And even if this were true, it would be inapplicable here, because the decree which was affirmed in effect makes an assessment against all three companies. Therefore the interpretation must be found in the preceding discussion and is based upon the theory of the non-identity of the two corporations or separate value to stock and assets, and therefore there is no duplication of taxation of each, notwithstanding the identity of ownership and the same value represented only in different forms. This conclusion, of course, is directly in the teeth of the decision under consideration. The conclusion reached by the court was that the California court had erred in including the value of the stock of the Mills National Bank in the value of the stock of the California Bank, as it had met the full requirements of the law when it as a stockholder of the Mills National Bank, paid the assessment against the stock owned by it, and that the value of that stock included in the value of the stock of the California Bank was erroneous and must be deducted therefrom. It further held that the inclusion of the value of the stock in the Mission State Bank as part of the general assets of the Bank of California, and adding its value to the other values in the stock of the Bank of California, was correct because the Bank of California could not be taxed as a stockholder in said bank, and said bank was not amenable to taxation itself. But it held that the separate tax levied against the California Bank as a stockholder in the Mission State Bank was erroneous and must be refunded. In these different ways all the value in the assets in the California Bank were taxed once, but not twice. The way the taxing officials

of Arkansas worked out the taxation here was in accord with the rule announced in this case, that is, the separate assessment of the Central Railway of Arkansas and the Choctaw Investment Company, and the assessment of all the value of the assets and stock of the Lumber Company, except the stock owned by it in these two corporations, which were excluded from the value of the capital stock and assets of the Fort Smith Lumber Company on account of their separate taxation. The decree appealed from, however, has aligned itself with the decision in California which permits the double taxation of these values under the guise of taxing separately two separate entities,—one the bank and the other the stockholders; just as in this case the decree fixes the assessment against the stockholding in the Fort Smith Lumber Company of the value of the stock of the Railway Company and the Investment Company, notwithstanding that value has been taxed against those companies. If the separate entity theory cannot be sustained in one case certainly it cannot be in the other.

A fortiori if not sustainable in a state permitting double taxation it is not sustainable in one forbidding it. Moreover, it is only invoked against one class of taxpayers. The opinion of Mr. Justice Wood heretofore quoted shows that in states where there is a requirement of equality in taxation that it is a violation of the equal protection of the Fourteenth Amendment for double taxation to be worked out against one class of taxpayers that is not worked out against another.

Respectfully submitted,

JOSEPH M. HILL and
HENRY L. FITZHUGH,
Attorneys for Plaintiff in Error.

JAN 5 1920
JAMES D. MAHER,
CLERK

No. 394

In the Supreme Court of the United States

FORT SMITH LUMBER COMPANY
PLAINTIFF IN ERROR

vs.

THE STATE OF ARKANSAS, EX REL.,
JOHN D. ARBUCKLE, ATTORNEY GENERAL.

and

FORT SMITH LUMBER COMPANY, PETITIONER

vs.

THE STATE OF ARKANSAS, EX REL., JOHN D. ARBUCKLE, ATTORNEY GENERAL, RESPONDENT.

BRIEF IN REPLY

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for the Plaintiff in Error and Petitioner.

CALVERT-McBRIDE PRINTING CO., FT. SMITH, ARK.

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THE STATE OF ARKANSAS, EX REL., JOHN D. ARBUCKLE, ATTORNEY GENERAL, RESPONDENT.

Brief in Reply

ERRONEOUS STATEMENTS.

(a) At page 8 of the respondent's brief it is said: "No allegation is made of omission or of under-assessments of tangible property of any character, but the sole contest is over INTANGIBLE PROPERTY." This is a mistake. There is no issue whatever over intangible property as the agreed statement of facts expressly excludes any theory of outstanding intangible property not included in the assessments levied and paid. In paragraph 2 of the agreed statement of facts it is stipulated: "That each year the Central Railway of Arkansas was assessed fifty per cent (the basis of taxation) of the true market value of all its assets, real, personal and mixed, and including tangible and intangible property and that said assessment of fifty per cent of the true market value of its assets was also fifty per cent of the true market value of the stock of said Central Railway of Arkansas." (First Brief p. 16).

In paragraph 3 similar stipulation is made in regard to the Choctaw Investment Company. In paragraph 4 a similar stipulation in regard to the Fort Smith Lumber Company, except as to it there was excluded, from assessment of all assets the stock owned by it in the Railway Company and the Investment Company. This stock owned by the Lumber Company of the Railway Company and of the Investment Company was not intangible property, but personal property, so made by statute. Section 853 of Kirby's Digest makes the stock of corporations personal property.

The respondent's brief at page 22 states this and further points out that by other provisions of statute that stock of private corporations is subject to attachment and execution. Whatever may be its status elsewhere, in Arkansas, stock of corporations is personal property and not intangible property.

(b) At page 8 of respondent's brief it is stated that a unique phase is presented because of the legal status resulting from the indirect ownership of a large portion of defendant's assets. This is a mistake; there is no indirect ownership of any of the defendant's assets. The defendant Lumber Company owned certain shares of corporate stock of the Railway Company and the Investment Company, not in-directly, but directly, as such corporation it owned said stock. The Railway Company and the Investment Company owned certain assets and paid taxes upon those assets to the full measure of taxation, which was also the full measure of taxation of the value of the stock of the Railway Company and of the Investment Company. Hence, when the taxation of that stock is considered as a part of the assets of the Lumber Company it is found already taxed to the full measure of taxation.

In the Richardson case referred to at length in our first brief at page 49-65, there was exactly the same sort of ownership. In that case the Bank of California owned stock in the D. O. Mills National Bank and in the Mission State Bank and the Court did not treat such ownership as

indirect, but direct ownership of said stock and pro tanto ownership of the assets of the corporations which issued it.

(c) At page 8 of respondent's brief is reference to the defendant as a holding Company. It is said that the relationship between the Lumber Company was that of parent, or holding Company, and of the Railway Company as a subsidiary, or operating Company, and similarly they referred at Page 9 to the relation between the Lumber Company and the Investment Company. It is also questioned whether the Lumber Company can hold stock in these other corporations.

At page 36 the status of holding Companies in Arkansas is discussed; it is said that they have no legal status; that no statute authorizes one corporation to hold stock in another. It is further stated that the general rule is that one corporation has no power to acquire and hold stock in another unless the power is expressly granted or necessarily implied from the nature of the corporation.

It is inferred that the ownership of this stock was ultra vires and the amount invested in it must be treated as idle capital. These statements are erroneous, both as to facts and as to the law. The agreed statement of facts, paragraph 1, states that the Lumber Company was organized under Section 837 of Kirby's Digest. That section is the general incorporation law of the State for the creation of manufacturing, mining or other lawful business. Under this section a private corporation may be organized in Arkansas to do and perform any act which is lawful to do and perform. It is lawful for one corporation to own stock in another corporation when authorized by the articles of incorporation to do so.

In Lester v. Bemis Lumber Company, 71 Ark. 379, at page 384 the Court said: "Now, the general rule followed by most of the courts of the United States is that one corporation has no power to acquire and hold stock in another corporation unless the power is expressly granted or necessarily implied from the nature of the corporation."

In paragraph 1 of the Agreed Statement of Facts there is a quotation from the articles of incorporation of the Lumber Company which authorized it to own, buy, sell and deal in stocks of other corporations. The general rule of law is as stated by the Supreme Court of Arkansas in the Bemis case, that is, that it is lawful for one corporation to own stock in another corporation where the articles of incorporation so provide.

1 Machen on Modern Law of Corporations, Sec. 59.

At page 10 of the respondent's brief it is stated that there are not many holding companies in Arkansas, owing to the conspicuous absence of statutory authority therefor; but there is authority in the statutes for one corporation to own stock in another. There is nothing in the Statement of Facts to justify the respondent in calling the Lumber Company a holding Company or a parent company or anything of that kind. The only facts in the record relating to the relationship between these corporations is ownership by the Lumber Company of a definite number of shares in each of the other corporations named. Whether it owned one share or all of the shares of the other corporation can make no difference in the legal effect thereof. Under the authorities there is nothing ultra vires in this ownership by the Lumber Company of the stock in the other corporations, and therefore the Lumber Company cannot be treated differently than any other owner of stock in these corporations.

(d) At page 9 of the respondent's brief it is said: "No taxes have been paid by the defendant on its own 'capital stock' as such, nor specifically on its holdings in the two subsidiaries. This is exactly contrary to the Agreed Statement of Facts." In paragraph 4 it is stated: "Excepting the stock owned by the Fort Smith Lumber Company in the Central Railway of Arkansas and in the Choctaw Investment Company, the assets of the Fort Smith Lumber Company, real, personal and mixed, including tangible and intangible property, where for each of the years hereinafter mentioned assessed for fifty per cent of their

true market value, and said fifty per cent of the true market value of the assets was also fifty per cent of the value of the stock of the Fort Smith Lumber Company, less the value of the stock owned by it in said Central Railway of Arkansas and Choctaw Investment Company." (Page 17 of First Brief).

Paragraph 4 of the Agreed Statement of Facts shows that the Lumber Company made return as required by Section 6936 of Kirby's Digest which is set out at page 27 of our first brief.

The Supreme Court of Arkansas in the Bodcaw Lumber Company case, which is quoted at length in our first brief at page 25 to 29, construed the statutes to devise a legislative scheme to "Assess the property of the corporation itself, but to include the value of the shares of stock and tax them at the source." It further held that the value of the shares of stock do not constitute the limit of taxation but there is a compound, taking the valuation of the stock and of the assets after deducting the value of tangible property specifically assessed separately. The court further held that in this way the lawmakers devised a scheme for the taxation of all elements of value one time, and only once, and the taxes are levied at the source and paid there without assessments being levied against the individual shareholders.

Therefore the Agreed Statement of Facts just quoted shows that the capital stock as such has been paid upon, as well as the assets of the Company, and it is no use following an argument based upon a theory which is opposed to the facts agreed upon. It is further stated at page 9 that the stock holding in the other companies as a taxable element or factor of great value, existed all the while and directly contributed to the actual worth of defendant's own capital stock; and that it escaped taxation. This is absolutely contrary to the facts as agreed.

The Agreed Statement of Facts show full taxation levied against the Investment Company and the Railway Company,

not only on its assets but up to the full value of the stock and likewise shows full taxation levied against the Lumber Company for full value of its property and its stock, except the specific tangible property otherwise taxed.

Following that argument, it is stated (page 13) that it is immaterial whether the Investment Company and the Lumber Company had paid all taxes assessed upon their own property for the years involved. This cannot be immaterial, because the Supreme Court of Arkansas in the Bodcaw Lumber Company case expressly held that there must be deducted from the composite value of the stock and property the tangible property which is specifically assessed separately. But when it decided this case, it in effect held that that principle does not apply where the stock holder is a corporation. We are not questioning the principle laid down in the Bodcaw Lumber Company case but do contend that that principle must be applied to corporations as well as to individuals. The Supreme Court instead of considering that proposition when we pressed it upon them, ignored it and decided this case upon a defense which had been interposed in the lower court and abandoned there, viz: That the purchase of this stock was from a surplus, and not from original capital. The effect of the decision is that the Bodcaw Lumber Company decision is sound except where the stock holder in a corporation and then he must pay twice; once as a stock holder in that corporation and again through the issuing corporation.

(e) A remarkable mis-statement of facts is found at page 58 wherein it is stated that to allow the Lumber Company to deduct the value of its stocks in the Railway Company and the Investment Company is tantamount to allowing a full and complete exemption of the value of its assets so invested. Then it is stated the law does not warrant such favoritism. Either the facts stipulated are not understood or else a queer twist is given to the admitted facts. In paragraphs 2 and 3 of Agreed Statement of Facts (our brief pages 16 and 17) it is stipulated that both the Railway Company and the Investment Company were assessed the

full market value of their assets, including intangible property, and that said assessment is also the market value of the stock of said corporation. And, paragraph 4 stipulates that the same was true of the Lumber Company, except the Lumber Company did not assess or pay upon the stock of the Railway Company or the Investment Company because they were separately assessed and paid upon. The Bodcaw Lumber Company case which is found quoted in our first brief, the point now considered at page 28, settles the method of taxation in Arkansas as requiring a consideration of both the stock and the property; their value may be coincident, but one may be higher than the other, the value of the shares is merged into the aggregate, forming a compound which is the basis of valuation for taxation purposes after deducting the value of tangible property which is specifically assessed separately.

To illustrate, suppose the Lumber Company's total valuation was $100,000.00, of which $10,000.00 was invested in stock of the Railway Company and $10,000.00 in the Investment Company. Now the full value of the property and stock of the Railway Company and the Investment Company has been assessed to each respectively at its source and the stock holder, the Lumber Company, charged with the payment upon its stock holding of $10,000.00 in each of these corporations. Therefore, when the Lumber Company pays its taxes it does not pay upon this $20,000.00, which is otherwise paid upon, but pays upon $80,000.00. Thus all of its value is taxed once, but not twice, and yet the respondent says that by so doing this $20,000.00 is exempt from taxation!

To follow its theory the Lumber Company must pay on the full $100,000.00, including the $20,000.00 otherwise paid upon by the Railway Company and the Investment Company, making payment upon a valuation of $120,000.00 whereas there is only a $100,000.00 of value.

This was the position of the California Court in the Richardson case, but the California Court to reach that

position frankly admitted that it was double taxation, but held that such double taxation was authorized under the constitution. In Arkansas it is forbidden, by the constitution, by statute and judicial construction. Through a system of deductions authorized by the statutes and sanctioned by the courts double taxation is avoided, except as now presented, when double taxation is upheld in Arkansas and that only where a stock holder is a corporation and not an individual.

This point was pressed upon the Supreme Court of Arkansas in this case, not only once but twice, yet the Court decided against the Lumber Company and its discussion was confined almost wholly to an abandoned defense interposed by the Lumber Company in the lower court to the effect that the stock in the Railway Company and the Investment Company was purchased from surplus and not capital stock. After the Supreme Court decided the Bodcaw Lumber Company case the paragraph of defendant's answer interposing this defense was no longer tenable and was not presented by the Lumber Company to the Court but notwithstanding that fact was the text of the Court's opinion. We submit that this is an arbitrary rule and an unequal placing of the burden of taxation upon corporation owners and is taking property of corporation owners without due process of law.

DEDUCTION OF INVESTMENTS IN STOCKS.

At pages 24, 38 and 40, probably elsewhere in respondent's brief, there are various inferences that the stock owned by the Lumber Company in the Investment Company and the Railway Company was not the subject of deduction, but rather was from its nature the subject of taxation irrespective of any other consideration. Therefore, we should make plain the condition of the Arkansas statute and decision on this subject. In Section 6872 of Kirby's Digest (the first section of the Revenue Law of the State,) "investments in bonds" and "investment in stocks" are defined, the

latter including the ownership of shares of stock in corporations.

In Section 6902 (which is quoted in respondent's brief at page 19) it is provided that no person shall be required to list in his assessment as part of his personal property or investment in stocks; "any share or portion of the capital stock or property of any Company or corporation which is required to list or to return its capital and property for taxation in this State." The Agreed Statement of Facts shows that these companies were required to list and return their property for taxation in this State. In Section 6872 the word "person" used in the Act is held to mean and include corporation. Therefore it was the law of Arkansas, until this decision, that the owner, individual or a corporation, of stock in a corporation, was not required to list said stock "as an investment in stock" or otherwise where that corporation was itself required to pay taxes upon its property in Arkansas. Therefore any argument or inference based on the theory that this stock owned by the Lumber Company in these other two corporations was an investment in stocks which is taxable at all events is not sound, because the statute expressly provides that when such investment in stocks is in a corporation required to list its property for taxation in Arkansas, then it is not taxable as such but its taxation is cared for in the corporation which issued it. At page 24 a misleading statement is made in this respect regarding the decision in the Home Fire Insurance Company case (97 Ark. 254) it is stated in the brief that the Court decided in that case that stock in a subsidiary held by a parent company is not deductible from the taxable value of the parent company's stock. Justice Hart wrote the opinion in that case. He stated in his dissenting opinion in this case that "capital stock" as used in that opinion was intended to denote the money which the share holders paid into the corporation when it was organized and not the broader meaning which was attached to those words later in the Bodcaw Lumber Company case. It is a mere play upon words to now refer

to their former use as applied to the present use of these terms. At page 38 it is stated that there is no deduction in value from capital stock in a corporation recognized in Arkansas, except that which originated in the Hempstead County Bank case. This is a mistake. In the Bodcaw Lumber Company case the Court yet recognizes the deduction of "the value of the tangible property which is to be specifically assessed separately." (First Brief on page 28).

Unfortunately the Court did not consider this question of deducting the value of the separate assessment in either of the two appeals in this case. Had they applied the principle of the Bodcaw Lumber Company case to it, necessarily the first decision of the Chancellor would have been affirmed or the last decision of the Chancellor would have been reversed. Now the law is left in this shape: that wherever an individual owns stock in a corporation he is not required to list that stock separately, or pay upon it separately: the value of his stock is paid upon at its source and he is charged with his share thereof by the corporation: whereas if that individual sells his stock to a corporation and it owns it at assessing time that corporation must list it and pay upon it twice; once in the corporation which issued the stock and again in the corporation which owns it. This was sustained in California on the theory that the California constitution permitted double taxation. It cannot be sustained in Arkansas where the court has said time and again that double taxation is contrary to the constitution of Arkansas; yet the Court has sustained it where the double taxation falls upon a corporation and not an individual. Certainly that is not equality of the law and most assuredly that is taking the corporation property without due process.

CAPITAL STOCK AS A BASIS OF TAXABLE VALUE

It is argued that the Court has rejected the principle of the Hempstead County Bank case that capital stock is the property of the corporation "and accepted the sounder

dictrine that capital stock for taxation purposes is the equivalent of the shares of stock in the aggregate." (Brief page 39).

With this as a premise the argument is made that the shares of capital stock is a basis and that it is immaterial what gives value to these shares—nontaxable bonds or what not—leading to the conclusion that the shares of the Lumber Company are subject to taxation as such, notwithstanding the property giving value to those shares is otherwise taxed. This specious reasoning enables the State to reap two harvests of taxation; one on the shadow and one on the substance as expressed by Judge Cooley in the quotation used in the Hempstead County case, (our first brief page 36). Unfortunately for the respondent this argument is without any basis whatsoever. It is builded upon the Bank of Batesville case, 92 Ark. 335. The proposition before the Court in that case was whether the statutes governing the assessments of banks in Arkansas (not the statutes on manufacturing and railway corporations which are under review here) created a tax against the property of the bank or against the shares of the capital stock. If the statutes were construed to result in assessing the property of a national bank, they were void as conflicting with the Federal statute on that subject. If the statutes could be construed to levy an assessment against the shares of stock, but running against the bank as trustees for the shareholders, they would be valid and consistent with the Federal statute. The Court following the First National Bank v. Chehalis County, 66 Wash. 64, and 166 U. S. 440, sustained the statutes. Under any other construction shares of stock in National Banks would have escaped taxation as well as its property. Therefore it is seen that there is absolutely nothing in the Batesville case that can have any bearing whatsoever on this case; it was the construction of a different statute on a different subject. On the other hand the theory that is sought to be invoked through the Batesville Bank case that there is taxation in Arkansas against shares of stock and taxation against the property represented by

the stock is untenable and in conflict with the last enunciation of the Supreme Court of Arkansas on this subject to-wit:—the Bodcaw Lumber Company decision. We refer again to this opinion as quoted at page 28 of our first brief, wherein the Court said: "The purpose of the lawmakers was to merge the separate valuation of the shares of stock into the aggregate valuation of the whole, and thus constitute the compound as a basis for fixing the valuation for taxation purposes, after deducting the value of the tangible property which is to be specifically assessed separately. In this way the lawmakers have provided a scheme for taxation of all of the elements of value of this property one time, and only one, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders. The scheme absolutely excludes any idea of double taxation, but it does provide an adequate means of including all the elements of value contained in the shares of stock and the tangible property of the corportation itself, merged into a composite whole." Therefore there is no basis in Arkansas for the theory which is now advanced and which was also advanced in the California Bank case that there could be taxation against the share of stock and taxation against the property represented by the shares. Such taxation is condemned in Arkansas, except as worked out in this particular case and necessarily is a denial of the equal protection of the law to corporations as property owners, as well as an arbitrary exercise of power against them.

THE BACK TAX STATUTE.

The respondent argues from history, politics and economics that the back tax statute is constitutional, notwithstanding the bill when introduced ran against persons and corporations, but as passed only against corporations. We will not repeat any of our argument against this Act which is rested principally upon Justice Wood's opinion copied in our former brief at pages 37-43. The trend of the argument to sustain the statute, seems to be this; that the cor

porations were the chief sinners in not paying taxes, or underpaying, and that a statute levelled against them alone was good as the corporations could not complain that individuals did not pay, or underpaid, because the corporations are only required to do by this statute what they should have done without it. Practically the same argument was made before many courts in cases where assessments were required to be at full value, but as a matter of fact were varying percentages under full value. The argument against relief by a tax payer who was discriminated against being that the tax payer should pay on a basis of 100 per cent of his property and if he was only paying 75 per cent he had no complaint that Tom, Dick and Harry were paying 60, 50 and 40 percent. This argument, however, has been declared unsound. One of the pioneer states in so doing was Arkansas.

Ex parte Fort Smith & Van Buren Bridge Co., 62 Ark. 461.

Judge Taft speaking for the Circuit Court of Appeals of the Sixth Circuit, in Taylor v. L. & N. R. R. Co., 88 Fed. 350, wrote an unanswerable opinion. The whole subject was reviewed by this court in Greene v. L. & I. R. R. Co., 244 U. S. 499, wherein it is held that a tax payer has relief in equity where he is assessed on a basis of 75 percent and other tax payers on a basis of 50 percent, notwithstanding the law required each to be assessed on a basis of 100 per cent; in other words uniformity in the burden of taxation must prevail. The same principle applies here. The fact that individual tax payers escape taxation, or are undertaxed, and the State can have no recovery against them for their full measure of taxation, and can collect against corporations under like circumstances, throws a greater burden of taxation upon corporations on account of the fact that individuals escape it, and thereby leave them without equal protection of the law and without uniformity in the burden of taxation.

THE VALIDITY OF BACK TAX STATUTE, IMMATERIAL.

The respondent apparently is not interested in the attack on the assessment worked out against the Lumber Company under the decree appealed from, if the statute can be saved. The brief devotes much time and space to an argument seeking to sustain the Act, but except inferentially has nothing to say to sustain the assessment worked out under the decree pursuant to the decision of the Supreme Court on the first appeal of this case. We have attacked here as we did in the Supreme Court of Arkansas the constitutionality of the Back Tax Act. The first assignment of error presents this question. The second and third assignments go to the invalidity of the assessment for the reasons stated, even if the Act is valid. (R. p. 26 and 27). We divided our argument into a, b, and c; a reaching to the first assignment of error, the invalidity of the Act and the respondent answers that, but does not answer the argument under the captions, b and c. Should the Court adopt Justice Wood's reasoning and find the Act unconstitutional, of course that ends the case; but the Court may well decide the case without ever going into the question of the constitutionality of the Act on the grounds set forth in assignments of error, 2 and 3, and for the reasons presented in our arguments b and c, brief pp. 45-49, and fortified in this position by the recent case of the Bank of California v. Richardson. The assessment is so manifestly arbitrary, and unequal taxation is so plainly enforced against this Lumber Company in making it pay twice upon the same value while individuals are paying only once upon it, that we infer that the learned Attorney General and Special Counsel do not care to commit themselves to sustaining such an injustice; and are merely seeking to sustain the Act under which suit is brought.

THE ANTI-CORPORATION ARGUMENT.

We do not regard the so-called history of Arkansas' corporation tendency material, nor the political or economic problems discussed important; and therefore have not ques-

tioned the accuracy of the historical assertions nor debated the economics or politics presented. But the so-called history is as illusory as the duality of shares and assets are fallacious as the basis of taxation. We resent somewhat, as unwarranted, the assumption running throughout the brief that the Lumber Company is seeking to escape back taxes, and that the Act was levelled against such sinners as this corporation.

The Agreed Statement of Facts shows that the Lumber Company, as well as the Central Railway and the Choctaw Investment Company, has paid its full quota of taxation, and if anything is due the State it is only because and on account of a fiction that there is a duality for taxation purposes of stock and property of a corporation. The Lumber Company has defended this litigation not to escape back taxes, but to avoid double taxation. Aside from such fictions as are relied upon, no one can or will question that the decree works double taxation to the extent of $35,000.00, the amount of it. This corporation is not as far as this record goes guilty of any attempt to escape taxes. It is only seeking to prevent the imposition of double taxes upon the same value owned by it. Therefore the argument against the sins of corporations generally seem rather out of place here; if they lead to anything it is to the fact that because it is a corporation that double taxation is not abhorrent as it otherwise would be.

Respectfully submitted,

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Attorneys for the Plaintiff in Error and Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 394

FORT SMITH LUMBER COMPANY
PLAINTIFF IN ERROR

VS.

STATE OF ARKANSAS ex rel.
JOHN D. ARBUCKLE,
ATTORNEY GENERAL

FORT SMITH LUMBER COMPANY
PETITIONER

VS.

STATE OF ARKANSAS ex rel.
JOHN D. ARBUCKLE, ATTORNEY GENERAL
RESPONDENT

Brief for Respondent, the State of Arkansas

JOHN D. ARBUCKLE,
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SUBJECT INDEX

	Pages
INDEX TO CASES CITED	2-3
OUTLINE OF BRIEF, WITH CHIEF AUTHORITIES	4-5
INTRODUCTION	7
ARGUMENT	12-104
A. *Assignments of Error*	13
B. *The Arkansas Revenue Law*	14-24
C. *Historical Setting*	25-32
D. *Settled Construction of Revenue Statutes*	33-68
E. *The Back Tax Act*	69-102
CONCLUSION	103
APPENDIX (Text of Back Tax Act)	105

INDEX TO CASES CITED

	Cited at Page
Adams Express Co. v. Ohio, 166 U. S., 185	41
Aluminum Co. v. Ramsey, 89 Ark., 522	82
American Sugar Refining Co. v. Louisiana, 179 U. S., 89	64
Bank of Batesville case, 92 Ark., 335	39
Bank of California v. Richardson, 248 U. S., 476	68
Bellows Falls Power Co. v. Com., 222 Mass., 51	50
Bell's Gap R. Co. v. Com., 134 U. S., 232	65
Boston R. Holding Co. v. Com., 215 Mass., 493; 102 N. E., 650	48
Bodcaw Lumber Co. case—See State v. Bodcaw Lbr. Co.	
Charles River Bridge Case, 11 Peters, 543	58
C., R. I. & P. R. Co. v. State, 86 Ark., 412	82
Citizens Natl. Bank v. Kentucky, 217 U. S., 443	72
Clark v. Titusville, 184 U. S., 329	64
Clement Natl. Bank v. Vermont, 231 U. S., 120	62
Com'l Fire Ins. Co. v. Board, 99 Ala., 1	52
Com'l Natl. Bank v. Chambers, 182 U. S., 556	59
Com'l Trust Co. v. Board, 87 N. J. L., 179	45
Com. v. Hamilton Mfg. Co., 12 Allen, 298	50
Com. v. Jarecki Mfg. Co., 204 Pa., 36	46
Com. v. N. E. Slate & Tile Co., 13 Allen, 391	50
Com. v. Westinghouse Elec. Co., 251 Pa., 12	46
Connolly v. Union Sewer Pipe Co., 194 U. S., 540	60
Corry v. Baltimore, 196 U. S., 467	35
Dallas County v. Bank, 87 Ark., 484	55, 56
Dallas County v. Home Fire Ins. Co., 97 Ark., 254	24, 54, 57, 59
Dartmouth College case, 4 Wheat., 518	74
Delaware-Lackawanna case, 198 U. S., 353	23, 46
First Natl. Bank v. Moon, 102 Kas., 334	51
Flint v. Stone Tracy Co., 220 U. S., 107	35
Florida Central & P. R. Co. v. Reynolds, 183 U. S., 471	62, 72
Forsythe v. Hammond, 166 U. S., 506	62
Gallup v. Schmidt, 183 U. S., 300	83
Giozza v. Tiernan, 148 U. S., 657	65
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S., 150	63
Hammond Packing Co. v. State, 212 U. S., 322	83
Harris Lumber Co. v. Grandstaff, 78 Ark., 187	37, 59
Harvester Bldg. Co. v. Hartley, 98 Kas., 732	51
Hawley v Malden, 232 U. S., 1	35
Hempstead County Bank case, 73 Ark., 515	38, 39

INDEX TO CASES CITED—*Continued*

	Cited at Page
Home Ins. Co. v. New York, 134 U. S., 594	67
Huntington v. Worthen, 120 U. S., 97	28
Kentucky Union Co. v. Kentucky, 219 U. S., 140	72
Kidd v. Alabama, 188 U. S., 730	61
King v. Mullins, 171 U. S., 404	72
League v. Texas, 184 U. S., 156	72
Merchants & M. Natl. Bank v. Com., 167 U. S., 461	64
Michigan Central R. Co. v. Powers, 201 U. S., 245	35, 62
Nicol v. Ames, 173 U. S., 509	60
Ozan Lbr. Co. v. Biddle, 87 Ark., 587	75, 82
Ozan Lbr. Co. v. Union County Bank, 207 U. S., 251	83
Peoples Bank & Trust Co. v. Board, 90 N. J. L., 171	45
People *ex rel.* N. Y. Clearing House Co. v. Barker, 179 U. S., 279	96, 99
Pike v. State, 5 Ark., 204	25
St. L., I. M. & S. R. Co. v. Berry, 113 U. S., 465	28, 57
St. L., I. M. & S. R. Co. v. Paul, 64 Ark., 83	65, 82
St. L., I. M. & S. R. Co. v. Worthen, 52 Ark., 529	62
St. L. S. W. R. Co. v. State, 235 U. S., 350	83
Savings & Loan Society v. Multnomah County, 169 U. S., 421	83
Schaefer v. Werling, 188 U. S., 516	62
Security Trust Co. v. Lexington, 203 U. S., 323	72
Simplex Elec. Heating Co. v. Com., 227 Mass., 225	49
Stanton v. Baltic Mining Co., 240 U. S., 103	84
State v. Bodcaw Lumber Co., 128 Ark., 505	23, 36, 37, 41, 59, 98
State v. Fort Smith Lumber Co., 131 Ark., 40	10, 23, 59, 98
State v. K. C. & M. Ry. & B. Co., 117 Ark., 606	69, 98
State v. J. K. Morrison & Sons Co., 155 N. C., 53	41
State v. New York Life Ins. Co., 119 Ark., 328	76
State Railroad Tax Cases, 92 U. S., 575	35
Sturges v. Carter, 114, U. S., 519	72, 79
Travelers Ins. Co. v. Connecticutt, 185 U. S., 364	35
Washburn Wire Co. v. Bliss (R. I. 1918), 105 Atl., 175	43
Webster v. Cooper, 14 How., 488	59
Weyerhauser v. Minn., 176 U. S., 550	72
Williams v. Supervisor, 122 U. S., 154	79
Wilson v. U. S., 221 U. S., 382	75
Winona & St. Peter Land Co. v. Minn., 159 U. S., 526	72
Wright v. L. & N. R. Co., 195 U. S., 219	63

OUTLINE OF BRIEF, WITH CHIEF AUTHORITIES RELIED UPON.

Pages

The Arkansas Revenue Law 14

The constitutional requirements, statutory provisions and judicial construction of the Arkansas Revenue Law as now settled is the basis for the decision of the court below.

Historical Setting 25

The general background, chronology of legislation and the contemporaneous unrest of the times reflects and confirms the court's interpretation of the Revenue Laws of Arkansas as applicable to corporations.

Settled Construction of Revenue Statutes 33

Corporations are judicially recognized as a distinct and appropriate legislative class (Flint v. Stone Tracy Co., 220 U. S., 107); and in matters relating to its internal revenues a State's legislative discretion is supreme (Hawley v. Malden, 232 U. S., 1). Holding companies occupy a peculiar legal status, and the "law of the case" as clearly pointed out (State v. Bodcaw Lumber Co., 128 Ark., 505; Dallas County v. Home Fire Ins. Co., 97 Ark., 254; State v. Crossett Lumber Co., 214 S. W., 43), and the construction thereof by the State court is controlling upon Federal courts (Com'l Natl. Bank v. Chambers, 182 U. S., 556). In such a field the Fourteenth Amendment is not "an iron rule of equality" (Bell's Gap R. Co. v. Com., 134 U. S., 232).

OUTLINE OF BRIEF, WITH CHIEF AUTHORITIES RELIED UPON —*Continued.*

Pages

The Back Tax Act 69

Retrospective laws are not new, but are of recognized validity (Sturges v. Carter, 114 U. S., 579). The constitutionality of the Arkansas Amended Act is not impaired because leveled at corporations only (Florida C. & P. R. Co. v. Reynolds, 183 U. S., 471) since—

(1) as a class they enjoy valuable privileges and immunities not accorded to individuals or firms;

(2) corporate assets possess peculiar properties which render their identity and evaluation inherently difficult;

(3) no additional burden is imposed;

(4) the consensus of economic opinion warrants the special treatment of corporations in tax matters:

Mr. Wm. W. Cook 85
Prof. Amos G. Warner 86
Judge Thomas M. Cooley 86
Prof. Horace L. Wilgus 89
Dr. John M. Mathews 90
Pres. Arthur T. Hadley 91
Mr. W. H. Lyon 92
Federal Industrial Commission 94

(5) The Act itself does not impinge upon the Fourteenth Amendment (State v. K. C., M. & Ft. S. R. & B. Co., 117 Ark., 606; Florida C. & P. R. Co., *supra*).

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 394

FORT SMITH LUMBER COMPANY
PLAINTIFF IN ERROR

VS.

STATE OF ARKANSAS EX REL.
JOHN D. ARBUCKLE,
ATTORNEY GENERAL

FORT SMITH LUMBER COMPANY
PETITIONER

VS.

STATE OF ARKANSAS EX REL.
JOHN D. ARBUCKLE, ATTORNEY GENERAL
RESPONDENT

Brief for Respondent, the State of Arkansas

INTRODUCTION.

This was a suit originating in the Chancery Court of Sebastian County, Arkansas, for the recovery from the Fort Smith Lumber Company of back taxes for 1915 and for several years prior thereto.

The plaintiff in error is a domestic corporation, organized in 1896, having a domicile at Fort Smith, in

Sebastian County, but operating its mills elsewhere—for recent years at Plainview in Yell County.

It possessed the usual facilities of a large lumber manufacturing plant, including timber and timber land held by direct title. It paid general taxes on specific property in the several counties where the various tracts were situate and in which the articles of tangible personal property were physically located.

No allegation is made of omission or of under-assessment of tangible property of any character, but the sole contest is over *the intangible property.* A unique phase is presented because of the legal status resulting from the *indirect* ownership of a large portion of defendant's assets, as we shall now proceed to explain.

THE DEFENDANT IS A HOLDING AS WELL AS AN OPERATING COMPANY.

During all the years between 1906 to 1917 inclusive the lumber company was the record owner of all of the capital stock ($260,000) of the *Central Railway Company of Arkansas,* a common carrier, regularly chartered under the laws of Arkansas and operating a standard gauge railway from Ola (on the main Rock Island line) to and beyond its mill at Plainview.

The capital stock of this railroad was part and portion of the defendant's investment and business plant. Whether it was acquired with the original capital stock of the lumber company or with its accumulated surplus and undivided profits we deem unimportant and immaterial. The relationship between the two corporations was that of "parent or holding company" on the one hand and "subsidiary or operating company" on the other. This intimate relationship continued during all these years and still subsists.

In 1910 defendant bought and thereafter held until 1915, in addition to its railroad stock already described, a large block of the capital stock of the *Choctaw Investment Company,* a domestic corporation owning valuable timber lands accessible for lumbering to defendant's mills. In 1915, by which time defendant owned 3996 of the 4000 shares of the investment company's stock, its holdings therein were of the value, according to the complaint, of $572,000—representing the net worth of this second subsidiary corporation, owned by the lumber company as a part of its plant.

IT HAS PAID NO TAXES ON CAPITAL STOCK.

No taxes have been paid by defendant on its own "capital stock" as such, nor specifically on its holdings in the two subsidiaries.

These stock holdings as a taxable element or factor of great value, existed all the while and directly contributed to the actual worth of defendant's own capital stock; and, as the property of defendant, this element has wholly escaped taxation.

Whether the lumber company legally possessed the power of a "holding corporation," and the validity of its relations with the subsidiaries, are questions which were not pressed in the pleadings below.

HAS THE DEFENDANT A RIGHT TO A DEDUCTION IN ITS OWN CAPITAL STOCK?

In the valuation of its own capital stock for tax purposes, has the defendant the right to deduct the amount thereof invested in stocks of other corporations?

It is claimed that the subsidiary corporations themselves have each paid all taxes assessed upon their own property for the years involved. Whether they have or not we deem irrelevant. The fact if true does not release defendant from the duty of paying its own taxes.

Our contention is (1) that the lumber company was obligated to pay each year its tax upon a proper valuation of its own "*capital stock;*" (2) that its "capital stock" for taxing purposes was the equivalent of *its shares of stock in the aggregate;* and (3) that the only deductions lawfully allowable therefrom was of (*a*) real estate (directly held) and (*b*) personal property—otherwise specifically assessed and paid on in Arkansas.

We think it had no right to a deduction for "stocks held in other corporations."

If we are right, the omitted taxes amount to $35,-681.61 (R. 17) as per stipulation.

There are not many "holding companies" in Arkansas, owing to the conspicuous absence of statutory authority therefor. But enough of the tribe may be found feeding in the deeper pools and eddies to warrant this test to determine their fiscal accountability to the State which created them, and under whose protecting aegis they are enabled to develop, flourish and mature.

In the first appeal, which was taken from the judgment of the lower court in dismissing plaintiff's demurrer to defendant's answer, "the law of the case" was settled and very plainly stated by the Supreme Court of Arkansas (R., 23-25).

State *ex rel.* Attorney General v. Fort Smith Lumber Co., 131 Ark., 40; 198 S. W., 702.

Upon the reversal of the decree the cause was remanded, and in due course came up for trial upon its merits.

In order to simplify the hearing and to facilitate the reaching of a decision, an "Agreed Statement of Facts" was entered into, reduced to writing and filed as a basis for the judgment of the court. From the decree thereupon entered, the Lumber Company appealed.

The Supreme Court affirmed the judgment and decree of the trial court (R., 19-25).

Ft. Smith Lbr. Co. v. State, 137 Ark., ...; 211 S. W., 662.

Thereupon, plaintiff in error prosecutes its appeal to this court, through writ of error duly granted on May 27, 1919 (R. 33).

ARGUMENT.

I. *The Writ of Certiorari.*

Several pages of counsel's brief are devoted to an argument to support the petition for a writ of certiorari. We shall not undertake to refute this argument, since we are making no point because of the silence of the State court with reference to the Federal question which we concede was aptly interposed in petitioner's pleadings.

We do not concede, however, that an express reference thereto was necessary for a correct decision by the court.

Since, in appealing to this court, counsel has out of abundance of caution employed both the "*writ of error*" and "*certiorari,*" one or the other of which must be the approved route, it were nugatory to raise any technical objection to the practice; so we pass to the merits.

II. *On the Merits.*

A. ASSIGNMENTS OF ERROR.

The petitioner, the Lumber Company, in suing out its writ of error, makes three assignments, viz:

(1) The Supreme Court of Arkansas erred in not declaring Act No. 169 of the General Assembly of the State of Arkansas of 1913 to be void as creating an arbitrary classification of property owned by corporations and discriminating against corporation owner-

ship of property, contrary to the equality provisions of the Fourteenth Amendment.

(2) The court erred in so construing the Constitution of the State of Arkansas and the taxing statutes of that State as to authorize and require taxation upon the full value of the stock and assets of the Fort Smith Lumber Company without deducting therefrom the value of the stock owned by it in the Choctaw Investment Company and in the Central Railway of Arkansas, which were separately assessed and taxed their full measure of taxation, such construction thereby imposing upon plaintiff in error double taxation, contrary to the equality and due process clauses of the Fourteenth Amendment.

(3) The court erred in so construing the Constitution and taxing statutes of Arkansas as to authorize and require taxation upon the full value of the capital stock and assets of the Fort Smith Lumber Company, including therein stock owned by it in the Choctaw Investment Company and in the Central Railway of Arkansas, upon which stock and assets of the Investment Company and the Railway there had been separate assessments and taxation as required by the laws of Arkansas; and such construction rendered same an arbitrary classification of property owned by a corporation and not applicable to similar property owned by an individual, and under said statute so construed the plaintiff in error has not the equality of the laws, and its property is taken without due process, contrary to the provisions of the Fourteenth Amendment.

Assignments (2) and (3) are substantially equivalent. So, "boiled down," the two grounds of plaintiff in error's appeal, both claimed as offending the provisions of the Fourteenth Amendment, are:

(1) *Invalidity of Back Tax Act.*—The Act of 1913 (being an amendment to the Arkansas Back Tax Act)

Art. XVI.

FINANCE AND TAXATION.

Sec. 5 [1] All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State.

[2] No species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper.

[3] Provided, further, that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity.

Sec. 6. All laws exempting property from taxation other than as provided in this Constitution shall be void.

Sec. 7. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party.

b. *Statutory Provisions—Kirby's Digest of the Statutes of Arkansas* (1904).

DEFINITIONS.

Sec. 6872. * * *

[3] The term "investment in stocks," wherever used in this Act, shall be held to mean and include all moneys invested in public stocks of this or any other State, or in any association, corporation, joint stock company or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by this Act, held by persons residing in this State, either for themselves or as guardians, trustees or agents, or by others for them. * * *

[6] And the word "person," as used in this Act, shall be held to mean and include firm, company and corporation.

[7] The term "personal property," wherever used in this Act, shall be held to mean and include:

[8] *First.* Every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property, as hereinbefore defined.

[9] *Second.* The capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stock, profits or means, by whatsoever name the same may be designated.

is void as creating an arbitrary classification of property owned by corporations and discriminating against corporate ownership.

(2) *Invalidity of the Court's Construction.*—The construction by the State Supreme Court of the revenue law of Arkansas as authorizing the taxation of the Lumber Company's capital stock without deduction of the value thereof invested by it in two subsidiaries which were separately assessed involves double taxation of the Lumber Company and constitutes an arbitrary classification of corporate property not applicable to similar property owned by an individual.

B. THE ARKANSAS REVENUE LAW.

For the convenience of the court we incorporate herein excerpts of the constitutional and statutory provisions of Arkansas which comprise the general revenue system of that State.

a. *Constitutional Requirements— Constitution of 1874 Now in Force.*

Art. II.

DECLARATION OF RIGHTS.

Sec. 19. Perpetuities and monopolies are contrary to the genius of the Republic and shall not be allowed. * * *

Sec. 23. The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the General Assembly may delegate the taxing power, with the necessary re-

striction, to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well being, but no further.

Sec. 29. This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto or to the other provisions herein contained shall be void.

Art. V.

LEGISLATIVE.

Sec. 33. No obligation or liability of any railroad or other corporation held or owned by this State shall ever be exchanged, transferred, remitted, postponed or in any way diminished by the General Assembly, nor shall such liability or obligation be released except by payment thereof into the State treasury.

Art. XII.

CORPORATIONS.

Sec. 12. The State shall never assume or pay the debt or liability of any county, city, town or other corporation whatever, or any part thereof * * * nor shall the indebtedness of any corporation to the State ever be released or in any manner discharged save by payment into the public treasury.

PROPERTY SUBJECT TO TAXATION.

Sec. 6873. All property, whether real or personal, in this State; all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of persons residing therein; the property of corporations now existing or hereafter created, and property of all banks or banking companies now existing or hereafter created, and all bankers and brokers, shall be subject to taxation; and such property, moneys, credits, investments in bonds, joint stock companies or otherwise, or the value thereof, shall be entered on the list of taxable property for that purpose.

PROPERTY—BY WHOM LISTED.

Sec. 6899. Every person of full age and sound mind shall list the real property of which he is the owner, situated in the county in which he resides, the personal property of which he is the owner, and all money in his possession; and he shall list all moneys invested, loaned or otherwise controlled by him, either for himself or as agent, attorney, or on account of any other person or persons, companies or corporations whatsoever, and all moneys deposited, subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic, whether in or out of said county or State.

Sec. 6906 requires that each person required to list property shall make out and deliver to the assessor a sworn statement thereof, enumerating the different items of property as named in Sec. 6910, which includes fifteen items, among them the following:

Thirteenth. The value of money invested in bonds, stock, joint stock companies or otherwise which such person is required to list.

Fifteenth. The total value of all other articles of personal property which such person by this Act is required to list.

EXONERATING CLAUSE.

Sec. 6902. * * * And no person shall be required to include in his statement, as part of his personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State.

TAXATION OF CORPORATIONS.

The Revenue Act requires corporations generally to make an additional return or schedule upon a special form designed to disclose the peculiar facts which would throw light upon the nature and value of the corporate property. The provision governing miscellaneous corporations (with numerous counterparts in the statutes of other States) is embodied in Sec. 6936 of Kirby's Digest, reading as follows:

Sec. 6936. [1] Gas, telephone, bridge, street railroad, savings banks, mutual loan, building, transportation, construction and all other companies, corporations or associations incorporated under the laws of this State, or under the laws of any other State and doing business in this State, other than insurance companies and the companies and corporations whose taxation is in this Act specifically provided for in addition to the other property required by this Act to be listed, shall, through their president, secretary, principal accounting officer or agent, annually, during the month of July, make out and deliver to the as-

sessor of the county where said company or corporation is located or doing business a sworn statement of the capital stock, setting forth particularly:

First. The name and the location of the company or association.

Second. The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

Third. The amount of capital stock paid up, its market value, and, if no market value, then the actual value of the shares of stock.

Fourth. The total amount of all indebtedness, except indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase or improvement of the property.

Fifth. True valuation of all tangible property belonging to such company or corporation.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of State; and shall also show in what county such property is situated.

RULE FOR VALUATION.

In Sec. 6974 there is contained the following provision, constituting a rule for the valuation of the several classes of property named, including—

[3] Personal property of any description shall be valued at the usual selling price of similar

property at the time of listing. If any such property shall have no well fixed or determined value in that locality at the time, then the same shall be appraised at such price as in the opinion of the assessor could be obtained therefor at such time and place.

[4] Investments in bonds, stocks, joint stock companies or otherwise, shall be valued at their value in money, and the quotations and selling price thereof may be considered in determining their values.

LIEN FOR TAXES

Sec. 7034. Taxes assessed upon real and personal property shall bind the same and be entitled to preferences over all judgments, executions, encumbrances or liens whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed from the first Monday in June to the year in which the assessment shall be made and shall continue until such taxes with any penalty that may accrue thereon shall be paid; provided, as between grantor and grantee said lien shall not attach until the first Monday in January in each year (Act of March 28, 1887, Sec. 40, as amended by Act of March 24, 1911, Acts of 1911, page 89; Mansf. Dig., Sec. 5712; first contained in substance in Act of April 28, 1873, Sec. 76; Gantt's Dig., Sec. 5153).

Sec. 7035. No property shall be exempt from sale or distress for taxes due thereon (Revenue Act of 1883, Sec. 101).

Sec. 7206. Said complaint [referring to the proceeding under the Back Tax Act] shall describe as nearly as may be the property on which said taxes have accrued; and the State, counties, school

districts and municipal corporations aforesaid *shall have a lien on said property from the passage of this Act, for the payment of said overdue taxes,* to be enforced by suit as herein provided.—(Act of March 1, 1887.)

THE BACK TAX ACT.

In 1887 the Legislature enacted the "Back Tax Law," in its original form (Acts 1887, p. 33). The author of the measure was the late Hon. James P. Clarke, then a representative from Phillips County, and afterwards successively President of the State Senate, Attorney General, Governor, and United States Senator. Two amendments have been made, increasing the authorized compensation to special counsel (Acts 1911, p. 324) and extending the purview of the law to reach underassessments (Acts 1913, p. 724).

The full text of the statute, as controlling the present action, will be found in the Appendix to this brief.

Infra, p. 105.

STATUS OF PRIVATE CORPORATIONS.

Since 1869 all private corporations in Arkansas have been created under and by virtue of a general incorporation act (Act of April 12, 1869; Kirby's Digest, Sec. 837 *et seq.*).

The stock of every private corporation is deemed in law personal property (Kirby's Digest, Sec. 853) and is subject to attachment (*Ib.,* Secs. 355-6) and execution (*Ib.,* Sec. 3235).

c. *Judicial Construction.*

The revenue law as it affects private corporations is thus a composite of general and special Acts enacted at different times.

THE LAW OF CORPORATE TAXATION AS JUDICIALLY CONSTRUED.

The entire system was well and exhaustively considered by the court of last resort and its application to corporate property was construed and made plain in the case of State of Arkansas *ex rel.* Attorney General v. Bodcaw Lumber Co., 128 Ark., 505.

That portion of the revenue law which applies to railroad companies (Kirby's Dig., Secs. 6940-6954) is adverted to by counsel [Brief, pp. 29, 30]. This is not apropos of the question now at issue, except that the fact may not be lost sight of that the railroad of the Central Railway Co. of Arkansas was upon its own property itself directly taxed in each of the years involved herein.

At this point we would emphasize the fact that under the revenue system of Arkansas, as judicially construed, the assets belonging to the Railway Co., consisting of separate items such as real estate, rolling stock, credits and other personalty, are entirely distinct from its *capital stock* (and surplus), which is the equity of its shareholders.

The *Bodcaw* case, 128 Ark., at page 519, held "capital stock" to mean "shares of stock in the aggregate, and not the capital of the corporation"—thus distinguishing it from the definition adopted in Pennsylvania and followed by this court in the *Delaware-Lackawanna* case, 198 U. S., at page 353. Therefore, under the settled law of Arkansas, "capital stock" for tax purposes is a distinct species of property,

corporate in its nature but entirely separate and apart from the property belonging to the corporation.

The railroad and rolling stock were the property of the Central Railway Company and directly and specifically taxable thereto; its capital stock, however, owned by the plaintiff in error (the Fort Smith Lumber Company, a separate domestic corporation), was taxable to, and as the property of, the Lumber Company.

Dallas County v. Home Fire Insurance Co., 97 Ark., 254, 260; 133 S. W., 1113.

The Supreme Court of Arkansas held in the *Home Fire Insurance Co.* case *supra,* that stock in a subsidiary, so held by the parent company, is not deductible from the taxable value of the latter's capital stock—a sound view, since stock-holdings are under a statutory definition "investments in stock;" and as such they constitute *property* expressly declared taxable under Kirby's Digest, Sec. 6872.

That decision declared that the exonerating clause of Sec. 6902, Kirby's Digest, does not apply to the stockholding of a corporate stockholder. The court's position in this leading case was clearly and unequivocally stated. As we shall show elsewhere, it was not without persuasive precedent in other States.

Infra, pp. 41, 52, *etc.*

C. HISTORICAL SETTING.

a. General Background—Legislative History and Shifting Public Policy.

Ever since the admission of the State of Arkansas into the Union, the dockets of her courts have been adorned with interesting suits involving fundamental principles of taxation. One of the first was instituted by the most spectacular citizen of her early days—General Albert Pike.

Pike v. State, 5 Ark., 204.

Following the period of the Civil War and the succeeding unrest and agitation, numerous efforts were made by the Legislature to correct the evils born of an open-handed policy of subsidization. As a result, one of the first curative acts passed was the Overdue Tax Act of March 12, 1881, which provided a special chancery proceeding for recovering back taxes on *real estate* alone.

Acts 1881, p. 63; repealed, Acts 1883, p. 17.

No serious question has ever been raised as to the validity of that Act and it has been frequently passed upon and sustained by the State Supreme Court. The nomenclature—"Overdue Taxes"—was retained in the present Back Tax Law passed in 1887, designed to reach a different class of delinquents.

Kirb. Dig., Sec. 7204.

In the year 1854 the first operations looking to the building of railroads in the State were begun. A survey of the Cairo & Fulton, now the St. Louis, Iron

Mountain & Southern Railroad, the principal railroad in the State, and a part of the great Missouri Pacific system, was made from the Missouri line to Texas; and a local company was formed to build it, but actual construction was not begun until 1858. Work was prosecuted in that year also in the building of the Memphis & Little Rock Railroad. In 1860 also the first telegraph line was established, and put into effect from Memphis to Little Rock.

Hempstead's History of Arkansas, pp. 326, 334.

ERA OF RECONSTRUCTION.

Powell Clayton was Governor from July 1, 1868, until 1871, when he was elected United States Senator, serving until 1877. In his inaugural message, July 2, 1868, Governor Clayton in a flight of adulation upon the crying need of immigration, said:

> Capital should be protected, industry fostered, and over each individual should be extended the strong and protecting arm of the law—guaranteeing upon the soil of Arkansas equal rights to all men.

Upon the subject of railroads, which seemed very dear to his heart, having been trained as a civil engineer, the Governor continued:

> Closely connected with the question of immigration are our railroad interests. The immigrant in seeking his new home is apt to follow railroad lines. And whilst it is true that our noble rivers, which spread over our State like great arteries, afford a natural means of intercommunication unsurpassed by any other State, they are insufficient, and, for traveling purposes must soon give way to railroad communication.

The very act of constructing railroads will bring into our State thousands of laborers, who will soon discover superior inducements to stay among us; and by communicating with their friends will produce a flow of immigration which, once started, will rapidly increase.

Can we do anything at this time to encourage this great interest that brings with it so many blessings? There is one important step I believe we can and should take in that direction. A railroad bill should be passed before you adjourn that will provide for the loaning of the credit of the State to such roads as are now, or may hereafter, be incorporated, that shall be shown to be of sufficient benefit to the State to justify such loan, and that may not have received from the general government, by grant of lands or otherwise, sufficient assistance to insure the completion of the same without the aid of the State.

I am indebted to Gen. M. Brayman, President of the Cairo & Fulton R. R. Co., for an able and concise statement of the history and condition of that corporation. This document will be submitted to you for your information.

Aftermath of the Civil War in Arkansas, Clayton, pp. 41-44.

The year 1874 witnessed the completion southwestwardly to the Texas border of the St. Louis, Iron Mountain & Southern R. R., which was the corporate successor to the Cairo & Fulton, referred to by Governor Clayton. That it did not succeed to all the benefits and immunities of its pioneer predecessor was developed later in the spirited litigation terminating

by decisions of this court, denying certain claimed exemptions from taxation.

St. L., I. M. & S. Ry. Co. v. Berry, 113 U. S., 465; 28 L. Ed., 1055.

Huntington v. Worthen, 120 U. S., 97; 30 L. Ed., 588.

b. *Chronology of Legislation.*

During the administration of Governor Clayton (1868-1871) many important constructive movements were launched by the Legislature, but among the actions of an opposite trend were the funding of the public debt, reviving the void bond issues of ill repute, and the issuance in aid of railroads, of a large amount of new bonds, also later declared void.

The Constitutional Convention of 1874 was called by the Legislature of that year, which had been convened by Governor Baxter in special session, and upon assembling had recognized him as the legally elected governor, thus terminating the "Brooks-Baxter War," a bloody contest between two factions of the Republican party.

ADOPTION OF PRESENT CONSTITUTION.

The present Constitution was submitted to the people and adopted on October 30, 1874, when Augustus H. Garland was chosen governor, and the so-called "carpet-bag" rule in Arkansas, more disastrous in some respects than the preceding Civil War, was brought to an end.

The "Fishback Amendment," adopted in 1885, prohibited payment of over $9,000,000 of bonds issued

under the Clayton regime and known as Railroad Aid Bonds, and the disputed Holford Bonds.

By 1887, an eventful year, both in State and Nation, the conservatives had again come completely into power and the Acts of the General Assembly for that session included not only the Back Tax Act now under consideration, but several others of related type. The general spirit of these Acts indicates an upward trend of public policy, and a positive, even if severe, attitude toward private corporate greed.

By this time, it must be remembered, the corporations had gained a tolerably secure footing in this virgin soil. In addition to the railroads, now serving more than half the counties of the State, the bankers were incorporating; insurance companies had entered the State, and the telegraph, telephone and express companies were eagerly appropriating a fruitful field hitherto untrammeled with unsympathetic laws. These corporations, all quasi-public in their scope, enjoyed free rein and were waxing strong and fat in a rapidly growing territory with taxes easy and administration lax. Those were "the good old days" of exemptions and State aid; and now the hour had struck for a change.

LEGISLATION CONCURRENT WITH BACK TAX ACT.

Among the related Acts and Resolutions adopted *pari passu* with the Back Tax Act, an even dozen may be noticed:

January 18, 1887, Joint Resolution No. 1 (p. 303), urging Arkansas Congressmen to support pending Interstate Commerce Bill.

January 31, 1887, Joint Resolution No. 9 (p. 308), creating a special joint committee to negotiate settlement of back taxes with the St. Louis, Iron Mountain & Southern R. R. Co.

February 21, 1887, Act No. 21 (p. 24), approving the proposition for settlement of back taxes by the St. Louis, Iron Mountain & Southern, R. R. Co.

February 26, 1887, Act No. 22 (p. 27), prohibiting granting of free passes by railroads to State officers.

March 1, 1887, THE BACK TAX ACT (p. 33), providing for the collection of overdue taxes from corporations.

March 18, 1887, Act No. 63 (p. 89), for collecting of municipal school taxes in arrears for 1885 or previous years.

March 19, 1887, Joint Resolution No. 18 (p. 314), creating a joint committee to consider the offer of the Memphis & Little Rock Ry. in settlement of back taxes.

March 24, 1887, Act No. 81 (p. 113), to prevent unjust discrimination and exorbitant charges by railroads.

March 28, 1887, Act No. 92 (pp. 143-175), amending revenue laws (chiefly to correct void provisions of the Act of 1883).

March 31, 1887, Act No. 102 (p. 195), repealing laws donating lands to railroads.

April 4, 1887, Act No. 127 (p. 224), authorizing taxing of attorneys' fees as costs in suits against railroads.

April 4, 1887, Act No. 135 (p. 234), requiring foreign corporations to designate an agent within the State for service.

INFLUENCE OF GENERAL UNREST.

The disturbed condition above described during the two decades preceding the passage of the Back Tax Act was by no means provincial merely, but its ramification permeated the country from coast to coast.

Woodrow Wilson in his "History of the American People," Vol. V, pp. 166 *et seq.*, thus describes this unique period of uncertainty and doubt:

> Financial disaster, a time of sharp stringency, when men looked to their investments, regretted their loans, questioned every adventure of business and stood dismayed to see the prosperity of the country of a sudden checked, it might be destroyed, added its thrill of excitement and of apprehension to bring the thought of the country to an imperative reckoning upon economic questions.
>
> As in 1873, so again now it was the too rapid development of railways, their too desperate competition for earnings which were at best insufficient to support them, and the reckless speculation of those who dealt in their stocks that brought the sudden contraction of values on, and then panic and ruin. The country was growing very rapidly alike in population and in the increase of wealth and the multiplication of resources. * * * Speculation had reached it highest point of reckless adventure in 1880. After that the price of railway securities began to decline, at first only a little, then very sharply, and in May, 1884, the inevitable crash came.

Again, at page 169, writes this distinguished historian-statesman:

> The country got from every quarter a disquieting sense of lax government, deranged busi-

ness, bad management in affairs, and the dissatisfaction and anxiety which such impressions produced inevitably operated to discredit the party in power.

Then followed Cleveland's election in 1884, after an unbroken Republican administration for twenty-five years.

It was during Cleveland's first term that there was passed on February 4, 1887, the measure known as the Interstate Commerce Act, forbidding for the first time railway corporations operating lines from one State to another, from making discriminations in rates or entering into combination for the purpose of sharing earnings or pooling freight receipts.

D. SETTLED CONSTRUCTION OF REVENUE STATUTES.

a. *Corporations as a Class.*

The essence of the discrimination which the Arkansas Court has upheld, both with respect to (1) the statutory mode of assessing *corporate property*, and (2) its sole inclusion in the purview of the Back Tax Act, finds just support, we think, in the undoubted advantages which the law bestows upon this selected class.

These advantages are now so well understood and so eagerly accepted by the commercial world that it seems superfluous to dwell upon them. We shall content ourselves, therefore, with a bare enumeration, borrowed from the latest comprehensive treatise, "Cyclopedia of Private Corporations," by William Meade Fletcher. Says Mr. Fletcher (1 Cyc. Priv. Corp., p. 42):

CORPORATE BENEFITS.

> The chief advantages of incorporation are these:
>
> First, through the process of incorporation, any number of persons may unite in a single enterprise without using their own names, without difficulty or inconvenience, and with the valuable right to contract, to sue and be sued, to hold or convey property in the corporate name.
>
> Second, an individual stockholder may dedicate to the corporate enterprise as much or as little as he sees fit, without risking more, and, in the absence of statutes to the contrary, this is the

limit of his liability, since stockholders are not personally liable for the debts of the corporation.

Third, the rights and obligations of a corporation are not affected by the death or change of the individual members, but the corporate business continues uninterrupted and unaffected so long as the corporate entity continues.

Fourth, the modern corporation makes great undertakings feasible since it enables many individuals to co-operate in order to furnish the large amounts of capital necessary to finance the gigantic enterprises of modern times.

President Nicholas Murray Butler of Columbia University recently said, "I weigh my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times, whether you judge it by its social, by its ethical, by its industrial, or in the long run—after we understand it and know how to use it—by its political effects. Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it. * * * It substitutes co-operation on a large scale for individual, cut-throat, parochial, competition. It makes possible huge economy in production and in trading. It means the modern provision of industrial insurance, of care for disability, old age and widowhood. It means * * * the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities."

This court itself in a recent case has made a helpful enumeration of corporate advantages:

The continuity of the business, without interruption by death or dissolution; the transfer of

property interests by the disposition of shares of stock; the advantage of business controlled and managed by corporate directors; the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships.

> Flint v. Stone Tracy Co., 220 U. S., 107, 162; 55 L. Ed., 389; Ann. Cas., 1912B, 1312.

b. *Legislative Discretion in Taxing Systems Is Supreme.*

This court, as well as the highest courts of many States, has recognized the validity of revenue laws which classify property for purposes of taxation to the extent of providing a different mode of assessment of certain forms of corporate property, such as railroads, telegraph lines and the like, from the great mass of other property owned individually.

> State Railroad Tax Cases, 92 U. S., 575; 23 L. Ed., 663.
>
> Travelers Insurance Co. v. Connecticut, 185 U. S., 364; 46 L. Ed., 949.
>
> Corry v. Baltimore, 196 U. S., 467; 49 L. Ed., 557.
>
> Michigan R. Tax Cases, 201 U. S., 245; 26 Sup. Ct. Rep., 459; 50 L. Ed., 744.
>
> Hawley v. Malden, 232 U. S., 1; 58 L. Ed., 477.

Such a classification, found necessary because of the inherent characteristics of the different kinds of

property dealt with, is not seriously combatted today by any student of economics or law.

c. *Status of Holding Companies; the Law of the Case.*

In Arkansas holding companies have no legal status. No statute authorizes one corporation to hold stock in another. The general rule followed by most courts of the United States is that one corporation has no power to acquire and hold stock in another corporation unless the power is expressly granted or necessarily implied from the nature of the corporation.

No argument has been adduced on the point of *ultra vires*, as the conclusion seemed to have been reached both by court and counsel that the question of the power of the corporation to so invest its capital and surplus was immaterial.

Our contention was that since the Lumber Company had no authority to acquire and hold stock in the subsidiaries its investments therein were *ultra vires*, and the State could consider that the "investment in stocks" (Kirb. Dig., Sec. 6872) stands for taxation purposes as so much idle capital. It is subject to *ad valorem* tax the same as cash or money in the bank.

The court had definitely construed the various provisions of the revenue law in the *Bodcaw* case, 128 Ark., 505; 194 S. W., 692, and held that "the words, capital stock, used in the statute mean the aggregate value of the shares in the hands of the shareholders."

Upon this construction it is manifest that *the value of* the capital stock which the statute requires the Fort Smith Lumber Company to annually list for taxation is to be ascertained, *first* by a consideration of the value of a single, separate share of its capital

stock; and, *second,* by multiplying the sum so ascertained by the total number of shares outstanding. The product will be found to be the exact equivalent of the totality of shares.

Says Mr. Justice Wood in the concurring opinion in the *Bodcaw* case (128 Ark., at p. 521):

> The assets of the corporation of every character and wherever located may be taken into consideration by the assessing officer in ascertaining the value of the shares of stock.

In *Harris Lumber Co. v. Grandstaff*, 78 Ark., 187; 95 S. W., 772, Mr. Justice Battle, speaking for the court, with reference to Kirby's Digest, Section 6936, said at page 192:

> The object of this statute is to secure a list of the personal property of the corporation for assessment. Other statutes make it the duty of the assessor receiving it to return it to the county clerk for taxation. The statute first mentioned obviously intends that a domestic corporation shall list its personal property in only one county. *It makes the capital stock a subject of taxation,* and makes it the duty of the corporation to give the assessor a statement showing the amount and value of it.

When we consider the law as a whole, there is no escape from the conclusion that the statute requires assessments to be made on the whole number of outstanding shares of stock. The lumber company's capital stock *in solido* is therefore valued as a unit upon precisely the same basis—with the same constituent elements of value—as if one were called upon to appraise a single share of its stock. The share is the unit—*e pluribus unum.*

HOW THE VALUE OF A SHARE IS REACHED.

And the value of one share of stock in this—a domestic corporation—is calculated by a process of analysis identical to that necessary for valuing a share of stock held by a resident taxpayer in a foreign corporation whose entire assets are beyond the jurisdiction of the State. Such share, as a part of the personal property of the resident would borrow its value wholly from the property held by the corporation issuing it. In such an analysis every asset of the corporation itself and every element contributing to the value of the share of stock under examination would have to be given its due weight to reach the blended value represented by the share so held in Arkansas.

WHAT DEDUCTIONS ARE ALLOWED.

The true mode of valuation having been adopted, a second question arises in the matter of *deduction.*

Absolutely no deduction in value from capital stock in a corporation is recognized or has ever been allowed in Arkansas except that originating in the *Hempstead County Bank* case, 73 Ark., 515; 84 S. W., 715.

The doctrine of deduction was there first read into the law in obedience to the compelling mandate of equality and conformity.

A COMPARISON WITH THE BODCAW CASE.

Now, a comparison of the reasoning of the principal and concurring opinions in the *Bodcaw* case, the latest utterance of the State court upon the subject, shows a sharp distinction not observed in the *Hempstead County Bank* case. The concept of capital stock *as the property of the corporation,* which seemed to

have forced that decision has now been rejected, and the court has accepted the sounder doctrine that capital stock for tax purposes is the equivalent of *the shares of stock in the aggregate.*

With this distinction in mind, it will be seen that an investment by the bank in real estate was not, accurately speaking, a *withdrawal* of capital stock, but was merely the lawful employment of so much of its funds in a form wherein it was separately taxed. This separate assessment was made directly to the bank *as owner* under the express requirement of Section 6899 of Kirby's Digest.

THE BANK OF BATESVILLE CASE.

What remains after separately listing its real estate under Section 6899 is by statute merely *deemed* "the property employed in banking" (Section 6921) Indeed, until the court's closer scrutiny of the process of taxing banks, involved in a determination of the *First National Bank of Batesville v. Board of Equalization,* 92 Ark., 335; 122 S. W., 988, the true nature of the tax assessment was not fully developed. In that decision (at p. 341) the court, speaking through the Chief Justice, remarked:

> This court has never construed the statute in a way that could have any bearing on the present question. In *Hempstead County v. Hempstead County Bank,* we merely held that, in summing up the valuation of the property of a bank for taxation purposes, the amount of capital stock invested in real estate should be deducted. But this is not inconsistent with the conclusion, either one way or the other, on the proposition whether the shares of stock are to be taxed.

And the court, in refusing to allow the Batesville bank a deduction for the amount of its capital stock

invested in United States Bonds, settled for all time the theory of the taxation of such property in Arkansas in the following language (92 Ark., at p. 344):

> The revenue statutes of this State now under consideration provide for the taxation of shares of stock and not the capital stock of the bank itself; and the method of assessment prescribed by this statute in requiring the bank to file a schedule setting forth the things enumerated, is merely intended as a method of arriving at the valuation of the shares of stock. The statute contemplates the assessment of the tax *in solido* against the bank as trustee for, or agent of, its stockholders, the same to be paid by the bank and collected from its stockholders.

The true subject matter of the tax is not "the property employed in banking" *as the property of the bank itself;* but it is the "shares of persons in banks" (Section 6922) which must be listed and paid by the corporation.

Thus it will be seen that such descriptive expressions as "value of moneys," "amount of capital," "amount of undivided profits," "amount deposited with the bank not withdrawable on demand," "gross sum," etc., occurring *passim* in Sections 6920-1, were not used in a technical, but rather in a colloquial sense. Looking to the ultimate purpose running through the statute, these terms and this antecedent process merely blaze the way—point out the procedure necessary to ascertain the value of such shares, the real subjects of the tax.

A duty is imposed upon the corporation to pay the taxes on the shares—not as owner but as representative or agent in behalf of the real owners, the shareholders, whose burden is shifted from their own shoulders by Sections 6902 and 6922-3 read together.

This is in keeping with the court's recent construction of the parallel provisions (Section 6936) for the assessment of similar tax subjects, viz: *Shares* in ordinary corporations like the plaintiff in error.

State of Arkansas v. Bodcaw Lumber Co., 128 Ark., 505; 194 S. W., 692.

The court refused a deduction in the Batesville Bank case, because it construed the thing taxed as *the share held by the individual* and recognized no equity in such individual for a deduction that would diminish the taxable value of his property. The refusal was based upon the assumption that the mere fact of the investment of the money represented by the share in a nontaxable subject is immaterial, since full value still remains in the share itself. This principle, we think, is the crux of the whole problem.

The highest court in the land had said that whatever property is worth for the purpose of income and sale, it is worth for the purpose of taxation.

Adams Express Co. v. Ohio State Auditor, 166 U. S., 185, 220; 41 L. Ed., 965, 977.

ANALOGOUS CASES IN OTHER JURISDICTIONS.

NORTH CAROLINA.

In *State ex rel. Corporation Commission v. J. K. Morrison & Sons Co.*, 155 N. C., 53; 70 S. E., 1079; L. R. A., 1915C (380-5, decided in 1911), the court held that the value of stock in other corporations cannot be deducted from the valuation of the capital of a corporation for taxation. And this was in the face of a statute in that State (having no counterpart in Arkansas) expressly providing for the deduction of the assessed valuation of real and personal property upon

which the corporation pays taxes, and of another statute providing that corporations *legally holding stock* in other corporations upon which a tax has been paid by the corporation issuing it shall not be required to pay any tax on such stock or list the same.

The North Carolina corporation of J. K. Morrison & Sons Co., resisted payment of taxes upon $10,350 of its stock, which represented its holdings in other corporations paying their own taxes. In passing upon the question, the court says (*italics* ours):

> It appears to be the policy of the General Assembly to require that all corporations * * * shall pay all taxes on their capital stock out of the treasury of the corporation instead of the individual stockholders paying them.
>
> This has been the law for many years and the same right is extended to a corporation owning stock in another corporation.
>
> As the individual stockholder is not required to list and pay taxes on such stock, neither is the corporate stockholder.
>
> *But we fail to see in the statutes anything which authorizes the deduction of such investments from the capital stock of the corporation owning them in assessing its value* as is the case with the "assessed value of real and personal estate." If such had been the intention of the Legislature, it would doubtless have been more explicit and would not have left its purpose in doubt, and to be arrived at by a process of reasoning.

Thus it is seen that the court unhesitatingly denies the right to such deduction, although the established

policy as crystallized in legislative enactment in that States does provide for certain deductions. In Arkansas, while a policy of deduction has been evolved by the Supreme Court in obedience to its interpretation of the "uniformity and equality" requirement of our Constitution, yet such principle has found no expression through the legislative branch. In that respect we think there is less equity in the Lumber Company's claim of such deduction here than there would be in North Carolina.

RHODE ISLAND.

The State of Rhode Island in 1912 undertook a complete revision of her revenue system, and enacted a comprehensive "Tax Act," Sec. 11 of which provides for the assessment of the "corporate excess" of all corporations "carrying on business for profit" in that State.

Washburn Wire Co., v. Bliss et al., 105 Atl. 179, is the most recent adjudication of that Act. It squares substantially with the present issue. It was held by the unanimous court that the plaintiff company, a Maine corporation doing business in Rhode Island and which owned all the capital stock of a New York subsidiary, was not entitled to a deduction of the assets of its subsidiary in determining the value of the corporate excess taxable in Rhode Island. This conclusion was reached, notwithstanding the plaintiff had enjoyed such privilege of deduction for many years prior to June 1, 1916, when by resolution it transferred the assets of the branch to the newly incorporated New York company.

In passing upon the question, the court said:

> The Maine corporation sold the property to the New York corporation to accomplish its own

ends and for its own advantages. Prior to the sale the Maine corporation was the owner of the property and as such was allowed a deduction for its value in the tax assessment of this State.

At this point the case presents a status similar to that of our *Bodcaw Lumber Company* case, except that by express statute in Rhode Island deduction of the foreign assets was authorized, whereas no such statute has ever existed in Arkansas.

Continuing, the Rhode Island court said (p. 181):

> When the sale was made, it is plain that it was the intent of the parties to change the ownership of the property and that the New York corporation should own and control it. Having made such change in ownership (certainly so far as the State of New York is concerned), we can see no reason why Rhode Island should be asked to disregard the transaction and hold that so far as she is concerned there has been no change effected. The property cannot be the exclusive property of each of two different corporations.

The court next employs a process of reasoning which is peculiarly applicable to the relation existing between the Fort Smith Lumber Company and its subsidiary corporations:

> We do not think that the legal effect of the transfer is changed by the fact that the Maine corporation *owns all of the capital stock.* Such stock ownership, it is true, gives to the Maine corporation the power to elect a board of directors and thereby indirectly to control the management of the New York company. The direct control and management of the New York corporation, however, is vested in the directors of that corporation

and the officers elected by them. If these directors legally exercise their discretion in the management of the New York company in a manner unacceptable to the Maine company, or to a majority of its stockholders, their only redress is by the election of new directors in the manner and at the time provided for *by the by-laws of the New York corporation.*

The direct control and management of the New York corporation is vested in the directors of that corporation and the fact that a majority of the board are also for the time being directors of the Maine company does not change their relation to either corporation or alter their power of control over the New York company.

NEW JERSEY.

In *Peoples Bank & Trust Co. v. Board,* 90 N. J. L. 171; 100 Atl., 155, the court of last resort of New Jersey refused to allow from the assessed value of the bank stock a deduction of the value of shares of stock in other banks, taxable elsewhere. This decision followed a previous rule adopted by the court, with due regard to the moral force of the duty to avoid double taxation, if possible. The opinion in *Commercial Trust Co. v. Board,* 87 N. J. Law, 179; 92 Atl., 799, is quoted as declaring that the means by which double taxation is avoided is "not by deducting or excluding personal property of the bank that is taxable elsewhere from entering into the assessed value of its stock, but by providing that such assessment shall render *the bank* immune from further taxation on such personal property to the extent that its value has entered into such assessment."

PENNSYLVANIA.

In *Commonwealth v. Jarecki Mfg. Co.*, 204 Pa., 36; 53 Atl., 517, a manufacturing corporation was held liable to pay taxes upon the amount of its capital invested in bonds of another corporation, although the latter agreed to pay the tax on the bonds.

One of the decisions pressed upon the attention of the Rhode Island court (in the *Washburn Wire Co.* case, *supra*), by the corporation was that of *Commonwealth v. Westinghouse Electric Co.*, 251 Pa., 12; 95 Atl., 807, but that case was distinguished and rejected in part as "inconsistent," and a conclusion was reached through independent reasoning, which proved entirely satisfactory to a unanimous bench.

The Pennsylvania case just mentioned (the *Westinghouse* case, 251 Pa., 12) was decided July 3, 1915, and subsequent to the decision in *Delaware, Lackawanna & Western R. R. Co., v. Pennsylvania*, 198 U. S., 341; 25 Sup. Ct., 669; 49 L. Ed., 1077.

Even with due regard to the mandate of the highest court in the *Lackawanna* case, the Pennsylvania Supreme Court affirmed the learned court of common pleas of Dauphin County in its position in the controversy then presented.

The facts, briefly, were these: The valuation of the capital stock of the Air Brake Company was $5,870,000, from which certain deductions were asked and some allowed. Both sides appealed. The company contended that it was the real owner of certain plants in Wisconsin and Canada, operated in the name of corporations styled, respectively, "The National Brake & Electric Company," and "The Canada Westinghouse Electric Co." It argued that "having become the owner of property located permanently out of the state, such property is not subject to valuation here; and if

not, its value must be deducted from the value of the aggregate capital stock upon which the tax has been charged."

The court, however, regarded the creation of a corporation in Wisconsin and of a limited company in Canada as "but the means to an end," indicating that such a step was necessary in order that the business of the defendant might be advantageously conducted at those places, and "to all intents and purposes the defendant owns these plants just as securely as if the legal title were vested in it."

But the court shifted its position when considering stockholding in blocks of less than the entire issue, and argued as follows (*italics* ours):

> As to the ownership of *shares of stock* in certain foreign corporations a different question arises.
>
> It is not pretended that the defendant company either owns or controls the property and business of these corporations.
>
> In order to establish business relations with these corporations, the defendant purchased *a limited amount of their capital stock,* but had nothing to do with their control and management. The defendant simply owns *some shares* in these corporations.
>
> In no proper legal sense can it be said that a Pennsylvania corporation, which owns a few shares in a foreign corporation, is thereby made the owner of personal property or real estate permanently located outside our jurisdiction.

It is easy to see how the court was driven into this apparent contradiction by the force of the *Lackawanna*

case, *supra* (198 U. S., 341); so the criticism of "inconsistency" made by the Rhode Island court seems eminently justified.

The net result of the three expressions of the sister States of Pennsylvania, New Jersey and Rhode Island, in a region where corporations are conspicuously numerous and powerful, seems to confirm our contention in the present case. The Fort Smith Lumber Company having chosen for business reasons to invest a large amount of its assets in the stock of a different and distinct corporation, is estopped upon broad principles of equity, aside from the force of the statute as construed by this court, from claiming immunity from an unabated valuation of its own capital stock.

If further persuasive authority is needed, let us turn to another neighboring State, the ancient commonwealth of Massachusetts, whose court of last resort sits upon a pedestal of the highest respectability.

MASSACHUSETTS.

In *Boston R. Holding Co. v. Commonwealth*, 102 N. E., 650 (1913), the Supreme Judicial Court of Massachusetts refused to sanction the deduction in the valuation of the capital stock of the holding company based upon the ground that the stocks in which the company's capital stock was invested, viz: the preferred and common stocks of the Boston & Maine R. R., were securities which, if owned by a natural person resident in Massachusetts, would not be liable to taxation. The court emphasized that what was taxed under the law is "the corporate franchise," and "in order to tax it, its value must first be determined" under the statutory method already firmly established. The court said (p. 651):

> The petitioner is not what would ordinarily be understood as a business corporation, but is

> expressly made subject so far as the valuation and taxation of its franchise is concerned to the same statutory provisions. Those provisions apply to it so far as its charter and the nature of its business and the kind of property belonging to and held by it admit, and the tax levied upon it must conform to those provisions so far as applicable.
>
> For the reasons stated, we are of opinion that the tax complained of was assessed in conformity with such provisions. * * * It is possible that the construction which we have given to the statute might lead to results which could not have been contemplated by the Legislature. But if so, that is a matter for the Legislature to remedy, and not for us.

The recent opinion in *Simplex Electric Heating Co. v. Commonwealth*, 227 Mass., 225; 116 N. E., 501, presents some interesting phases pertinent to our present discussion.

The Heating Company was a domestic (Massachusetts) corporation and subject to a tax upon its corporate franchise under a statute similar to the Rhode Island "Tax Act" already discussed. These statutes in their essence reach the same results as does our own revenue law, as construed in the *Bodcaw Lumber Company* case.

The Heating Company had a place of business in Illinois, where it kept a stock of goods and deposited money in a national bank and in a trust company, also certain accounts receivable arising out of business carried on in Illinois. It was conceded that Illinois had power to and did actually tax the property thus owned and managed in that State.

The Massachusetts law authorized certain deductions to be made from the value of the corporate franchise "as determined by the fair cash value of all its

shares of capital stock." The tax commissioner declined to make such deduction of the value of the Illinois bank deposits and the accounts receivable. The court had already held in *Bellows Falls Power Co. v. Commonwealth,* 222 Mass., 51; 109 N. E., 891; Ann. Cas. 1916C, 834, that the shares of stock in a foreign corporation owned by the Power Company were not to be deducted from the value of the corporate franchise; and in the case at bar the court went still further and held that the word "property" as used in the exonerating clause of the tax statute does not include intangible property in another State; and accordingly held that a corporation holding a stock of goods and money deposited in a foreign trust company and certain accounts receivable abroad, was not entitled to a deduction thereof.

As if by way of apology, the court added:

> If our interpretation results in intangible property, which already has been taxed in another State, being also considered for the purpose of fixing the excise tax on domestic business corporation, such in our opinion was the intention of the Legislature, and applications for further exemptions must be addressed to that body.

This position was taken after very mature deliberation and with full knowledge of the peculiar history of corporation taxation in Massachusetts, and the existence at one time of statutory authority for crediting to the corporation real estate outside the commonwealth, United States bonds, and even shares of another corporation, on which it paid taxes in Massachusetts (which, if still true, would present a status parallel with and favorable to that of the Fort Smith Lumber Co.).

> Commonwealth v. N. E. Slate & Tile Co., 13 Allen, 391.
>
> Commonwealth v. Hamilton Mfg. Co., 12 Allen, 298, affi'd in 6 Wall., 632; 18 L. Ed., 904.

The further fact is noted that no restrictive language is found in the Massachusetts Constitution similar to several expressions in the Arkansas organic law, one of which prohibits the exemption of any property whatever from taxation, other than as therein authorized.

Ark. Const., Art. XVI, Sec. 6.

KANSAS.

In a series of cases, of which the *First National Bank of Junction City v. Moon*, 102 Kan., 334; 170 Pac., 33, is the leading one, the Kansas court had up for consideration the assessment of the capital stock of several banks, both State and National. There was a very exhaustive examination of the various defenses interposed and the opinion of the court is remarkable because of its original and unbiased viewpoint. It was finally held that no deduction may be made for real estate in other States owned by State banks, national banks or loan or investment companies.

It will be remembered the same court had a short time previously held as did the Arkansas court in the *Bodcaw* case that the true basis for the valuation of a corporation's taxable property was the aggregate value of its outstanding shares, and that to value the corporation's property for taxation was tantamount to estimating the aggregate values in the hands of shareholders of all the outstanding stock.

Harvester Bldg. Co. v. Hartley, 98 Kan., 732; 160, Pac., 971.

ALABAMA.

In *Commercial Fire Ins. Co. v. Board of Review,* 99 Ala., 1; 42 Am. St. Rep., 17, the appellant and the Bank of Montgomery, each a domestic corporation, were capitalized at $100,000. The insurance company sought to obtain release from $51,000 of the tax assessment against it on the ground that that amount of its capital stock was invested in capital stock of the bank.

The petitioner showed that all of its capital stock was not worth exceeding $100,000, and that the contested portion was only worth par, and had been duly assessed to the bank. It claimed that since the bank returned for taxation its own property, the imposition of a tax against the insurance company's holding was to that extent a duplication and unauthorized.

The court, speaking through its Chief Justice, reveiwed the elementary principles controlling the formation and status of private corporations, quoting the well known commentators, Cook and Morawetz, on Corporations, and other text-writers, all "with a view of presenting clearly and fully the nature and object of capital stock in a corporation." Says the court (page 21 of 42 Am. St. R.):

> As property it (capital stock) has peculiar attributes. Collectively, it is the property of the corporation, while the ownership of the shares is in the shareholders.
>
> Sale and disposition of the shares by the several owners is free and untrammeled, save as the law or by-laws of the corporation may have prescribed rules.
>
> Not so with the capital stock. That is a security or pledge the law exacts, as a condition on which it grants the corporate franchise, the right

to incur liabilities, for the discharge of which no responsibility rests on any natural person. It is the indispensable condition on which the law-making power grants the franchise, because the law and public policy so declare. And the capital stock is a trust fund; a trust for the benefit and security of the corporation's creditors.

The court further explains (at pp. 25-27):

The corporation owned its capital stock, and presumptively at least, did not own the shares of its capital stock. Hence, the propriety and reasonableness of the averment that it was so invested, and not shares in its capital stock, pretermitting, for the sake of argument, its want of corporate power to invest its capital stock.

The exact and specific case made in the petition is that the capital stock of one corporation—the thing itself—is invested in the capital stock of another corporation. And, it may be added, this averment was necessary to give the petition a semblance of merit. Capital stock—the insurance company's capital stock—was the subject of the tax, and in order to maintain the discount or deduction claimed, it was necessary to aver and show that that specific subject of taxation—the capital stock or some portion of it—had been "invested in property which is otherwise taxed as property."

CAN ONE DOLLAR DO THE WORK OF TWO?

We are thus confronted with the question, Can one and the same sum of money at one and the same time serve the purpose of capital stock for two corporations?

Let us suppose that in the case before us disaster should overtake both corporations, and it

should become necessary to exhaust the capital stock of each in the payment of its liabilities. Is it not manifest that the one hundred thousand dollars the law required as a pledge and guaranty from each company would not be forthcoming? Fifty-one thousand dollars of the sum could not meet the double demand of that sum from the respective creditors of the two companies. One dollar cannot pay two.

Not having invested the money in anything they were authorized to invest it in, *is it not the sentence of the law that they made no investment whatever*? And if the money is not found in the vault of the corporation, are not the directors personally liable for it?

THE LAW OF THE CASE.

ARKANSAS.

This brings us to a discussion of the precedent upon which we chiefly rely, *Dallas County v. Home Fire Ins. Co.*, 97 Ark., 254; 133 S. W., 1113.

The point on the *Dallas County* case which determined the judgment of the court is thus stated by Mr. Justice Hart at page 259:

> Our Constitution provides that all laws exempting property from taxation are void. * * * On the other hand, it is equally evident that the purpose of the Legislature in passing the Act (Kirb. Dig., Sec. 6902) was to prevent double taxation. This court sustained the Act and held that the shareholder was not required to assess and pay taxes on his shares of stock because the corporation was required to assess and pay taxes on its capital stock and property (*Dallas County v.*

Banks, 87 Ark., 484; 113 S. W., 37). This was in effect to hold that taxation of both the shares of stock issued by a corporation and of the capital stock or property of the corporation constitutes double taxation and therefore contravenes the provision of our Constitution above quoted. (Art. XVI, Sec. 6.)

LOGICAL DISTINCTION BETWEEN INDIVIDUAL AND CORPORATE STOCKHOLDER.

To illustrate, if an individual purchases shares of stock in a corporation, he is not required to pay taxes on them in this State, because the corporation which issued them must do that. So, if one corporation purchases shares of stock in another corporation, it does not pay taxes on the shares so purchased, for the corporation which issued the shares must pay the taxes on its own property; *but it does not follow that the first corporation is not required to assess and pay taxes on its own capital stock* because it has invested all or a part of it in the stock of another corporation.

In such case the corporation differs from an individual, in that it has capital stock on which it must pay taxes and an individual has not.

To hold otherwise would be to exempt the property of the first corporation from taxation, which it cannot be presumed that the Legislature intended to do, and which it has no power to do.

To carry the argument of appellee to its logical sequence, if a dozen insurance companies were organized under the laws of this State, and each in turn invested its capital stock in the shares of another, only the last corporation would pay any taxes; and that of the others would be exempt

from taxation contrary to the provisions of our Constitution.

WHAT IS THE CONTROLLING RULE?

Again, at page 260, the controlling rule is stated in these succinct words:

> The rule is that the capital stock or property of a corporation must not be taxed twice in the hands of the corporation.

This rule the court found no difficulty in harmonizing with *Dallas County v. Banks,* 87 Ark., 484, and squarely (and we think logically) applied a standard which fits the present case and that of similar holding companies in Arkansas. Said Justice Hart:

> Applying the rule to the case at bar, we hold that appellee is not required to assess and pay taxes on *the shares of stock* purchased by it in other corporations which are required to assess and pay taxes on their own capital stock or property, but that it is required to assess and pay taxes on *its own* capital stock or property.
>
> In this way each corporation pays taxes in the aggregate on its own capital stock or property, and it is not again taxed separately to the individual shareholder in proportion to the number of shares held by each.

THE FACTS IN THE INSURANCE COMPANY CASE.

The Home Fire Insurance Company was assessed $162,500 upon its capital and surplus—on a basis of 50 per cent of the admitted investment of $325,000. In the test case, which was appealed from the circuit court and originated in the county court on appeal

from the equalization board, the company's petition showed assets as follows:

Stocks of Arkansas corporations	$317,000
Stocks of Louisiana corporations	4,000
Stocks of Texas corporations	2,260
Total amount invested in capital stock of other corporations	$323,260

This left only $1,740 of other property—probably cash, credits or office fixtures—upon which alone the insurance company claimed it should be taxed.

It was conceded that these corporations whose stock was so held by petitioner had all paid their legitimate taxes to their respective sovereignties. The insurance company resisted the tax solely on the ground that the attempted assessment to it was unlawful *double taxation.*

THE FUNDAMENTAL PRINCIPLE APPLICABLE TO ALL TAX CASES.

This court recited at the beginning of the opinion in *Dallas County v. Home Fire Ins. Co.* (97 Ark., at p. 257) a fundamental principle:

> Statutes relative to the assessment and taxation of property must be construed in connection with the Constitution. Hence it may be said at the outset that the Legislature has not intended to exempt the property of corporations from taxation contrary to the provisions of our Constitution.

In *St. Louis, Iron Mountain & Southern Ry. Co. v. Berry,* 41 Ark., 509, one of the ablest judges who ever sat on the Arkansas bench declared (p. 520):

> It is an unbending rule of construction that an exemption from taxation is *strictissimi juris*. As it is never created in the first instance by implication, so it is never extended by construction. A claim of this sort cannot be supported unless the statute alleged to confer it is so plain as to leave no room for controversy.

And then, quoting from the celebrated *Charles River Bridge* case, 11 Peters, 543, Justice Smith added:

> "In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

Shall such a venerable policy now be overturned? Can a barrier now be interposed by this court which will permit the very result the Legislature in obedience to the controlling mandate sought to avoid?

NO EXEMPTION IS PERMITTED BY LAW.

In our view, to allow the Fort Smith Lumber Co. to deduct the value of its stocks in the Central Railway of Arkansas and the Choctaw Investment Company, is tantamount to allowing a full and complete exemption of the value of its assets so invested.

The law does not expressly or by implication warrant such favoritism.

All property is liable to taxation.

The position of the Lumber Company is tantamount to a claim of immunity from any tax whatever upon its stock investments in the two subsidiary corporations.

d. *Construction of State Court Controlling.*

The construction of the revenue law of a State by its court of last resort is final, so far as mere interpretation goes, and cannot be challenged or rejected before this tribunal.

In determining what is the law of the State, the Federal courts will be governed by decisions of the court of last resort of the State, and if those decisions have fluctuated or varied, the Federal court is usually controlled by the latest authoritative decisions.

Webster v. Cooper, 14 How., 488; 14 L. Ed. 510.

Note, 40 L. R. A. (N. S.), 396, at p. 444.

Com'l Nat'l Bank of Ogden v. Chambers, 182 U. S., 556; 45 L. Ed., 1227.

The construction of the court of last resort of Arkansas on the taxation of corporations is not characterized by fluctuation, but is found in the following harmonious series of decisions:

Harris Lumber Co. v. Grandstaff, 78 Ark., 187; 95 S. W., 772.

Dallas County v. Home Fire Ins. Co., 97 Ark., 254; 133 S. W., 1113.

State of Arkansas *ex rel.* v. Bodcaw Lumber Co., 128 Ark., 505; 194 S. W., 692.

State of Arkansas *ex rel.* v. Fort Smith Lumber Co., 131 Ark., 40.

PRINCIPLES OF CONSTRUCTION APPLICABLE.

In *Nicol v. Ames,* 173 U. S., 509; 43 L. Ed. 786, at pages 515-16, this court, speaking through Mr. Justice Peckham, in weighing the constitutionality of a direct tax imposed by Congress, said:

> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economical or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. * * *
>
> Taxation is eminently practical and is in fact brought to every man's door, and for the purpose of deciding upon its validity, a tax should be regarded in its actual practical results, rather with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

In *Connolly v. Union Sewer Pipe Co.,* 184 U. S., 540; 46 L. Ed., 679, Mr. Justice Harlan, speaking for thi scourt, said (p. 562):

> Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes.
>
> It would be an intolerable burden if a State could not tax any property or calling unless at the same time it taxed all property or all callings. Its discretion in such matters is very great and

> should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade rights secured by the Constitution of the United States.

Applying these principles, we submit that a State may in its discretion survey its political horizon, as Arkansas did in 1887, and determine to search out by a systematic inquiry those revenue leaks which by reason of volume and commercial importance deserve first attention; and, having determined the expediency of such inquiry, to establish by orderly procedure the liability of any taxpayer for omitted portions of taxes for previous years. Granted such discretion exists, does it not obviously extend to the power of choosing the class of tax subjects which it will include in the reassessment process?

In *Kidd v. Alabama,* 188 U. S., 730; 47 L. Ed., 669, Mr. Justice Holmes, speaking for this court, said at page 732:

> We see nothing to prevent a State from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock.

The right of Arkassas to classify railroad property for taxation was established in *St. Louis, Iron*

Mountain & Southern R. R. Co. v. Worthen, 52 Ark., 529. See also—

Schaefer v. Werling, 188 U. S., 516; 47 L. Ed., 570.

Florida Central & P. R. Co. v. Reynolds, 183 U. S., 471; 46 L. Ed., 283, 286.

Clement National Bank v. Vermont, 231 U. S., 120; 58 L. Ed. 147, where it is said (p. 134):

It must also be recognized that in exercising its authority to tax property within its jurisdiction, the State is not limited to one method. It has a broad range of discretion in classifying subjects of taxation and in employing different methods for different sorts of property.

Forsythe v. Hammond, 166 U. S., 506; 41 L. Ed., 1095, 1100.

e. *The Fourteenth Amendment—When Not an "Iron Rule of Equality."*

In *Michigan Central R. R. Co. v. Powers,* 201 U. S., 245; 50 L. Ed., 744, at page 293 (L. Ed., p. 761), this court quoted with approval the following extract from Judge Wanty, who delivered the opinion of the Circuit Court.

There can at this time be no question after the frequent and uniform expressions of the Federal Supreme Court that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an iron rule of equality, to

> prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice (citing many cases).

In *Wright v. L. & N. R. R. Co.,* 195 U. S., 219; 49 L. Ed., 167, in an opinion by Mr. Justice Holmes it was held that the Georgia Railroad, which was merely a holding company to the extent of the stock owned by it in the Western Railway of Alabama, was nevertheless taxable upon that stock, though the property represented by it was duly paid on in Alabama.

The rule is well established that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification; and the exception to the rule has been very plainly stated in *Gulf C. & S. F. R. Co. v. Ellis,* 165 U. S., 150, 41 L. Ed. 666, where in asserting that such classification cannot be made "arbitrarily" these concrete illustrations are used (at p. 155):

> The State may not say that all white men shall be subjected to the payment of the attorneys' fees for the parties successfully suing them and all black men not.
>
> It may not say that all men beyond a certain age shall be alone thus subjected or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference, which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

In that case the court held the Texas statute invalid which imposed the penalty only upon railroad corporations, explaining that "the hazardous business of railroading carries with it no special necessity for the prompt payment of debts; that is a duty resting upon all debtors and, while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. * * * The statute arbitrarily singles out one class of debtors and punished it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or *in consequence of any special corporate privileges bestowed by the State.*"

In *Merchants & Manufacturers National Bank v. Commonwealth,* 167 U. S., 461; 42 L. Ed., 236, a State statute, making national banks agents to collect taxes from their shareholders without compelling a State bank to do the same, did not make such a discrimination as is prohibited by U. S. Rev. Stat., Sec. 5219 because of the possibility that some of the shareholders in other banks may escape taxation.

In *American Sugar Refining Co. v. Louisiana,* 179 U. S., 89; 45 L. Ed., 102, it was held that equal protection of the law was not denied manufacturers by the Louisiana license tax imposed upon them but from which planters who refine their own products were exempted.

Clark v. Titusville, 184 U. S., 329; 46 L. Ed., 569, upheld a Pennsylvania city ordinance, which divided merchants into classes, according to the amount of their sales, and imposed a license fee based upon a ratio corresponding with the amounts of their sales.

St. Louis, Iron Mountain & Southern R. R. Co. v. Paul, 64 Ark., 83; 37 L. R. A., 504, was affirmed by this court on March 6, 1899, in 173 U. S. 404; 43 L. Ed., 746, upholding the Arkansas Act of 1889, which required railroad companies to pay their employees when discharged their unpaid wages then earned, without deduction, else such wages should continue at the same rate until paid.

Chief Justice Fuller in *Giozza v. Tiernan,* 148 U. S., 657; 37 L. Ed., 599, 601, restated the then well established rule:

> Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, *special either in the extent to which it operates* or the objects sought to be obtained by it.

In *Bell's Gap R. Co. v. Commonwealth,* 134 U. S., 232; 33 L. Ed., 892, this court coined the phrase, "an iron rule of equal taxation," and made plain that the Fourteenth Amendment intended only that equal protection should be given to all *"under like circumstances."* A tax had been imposed by the State of Pennsylvania upon the face value of corporate bonds, a departure from the *ad valorem* tax principle, which the corporations contended was discriminatory. Said Mr. Justice Bradley (p. 895):

> But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment * * * was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways.

It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them.

All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. * * * It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation.

John Randolph Tucker in his excellent treatise on the Constitution of the United States in speaking of the Fourteenth Amendment says (p. 862):

Accordingly it is held that taxes may be unequal on different classes of persons or subjects without offending the terms of this amendment.

If the taxpayers are in like condition and subject to like conditions, or the subjects of taxation are the same, the doctrine of equality may be invoked as controlling them, though this is not clearly established. But the amendment does not touch the power of a State to adopt its own system of taxation, however unequal it may be, if it

> does not operate unequally upon the same persons or subjects of taxation in precisely like conditions.

Prof. Tucker at page 863 adverts to the interesting cases which have arisen in respect to corporations under the Fourteenth Amendment. While it is clearly established by the decision of this court that a corporation is a citizen within the meaning of the clause conferring jurisdiction in United States courts in cases between citizens of different States, yet when the question of equality of burden upon the property of the corporation and the property of an individual arises, "it is proper to take into view that the corporation and the individual do not stand upon the same plane as to their rights" (p. 864).

The corporate rights are special privileges conferred by a charter—privileges which do not appertain to the individual. There may, therefore, be reason and justice, in order to attain an absolute equality of burden between a corporation and an individual, to take into consideration the special privileges conferred upon the one and denied to the other.

The tax on corporations has in many instances been assessed differently from taxes upon the individual. In *Home Ins. Co. v. New York,* 134 U. S., 594; 33 L. Ed., 1025, a State tax upon all corporate franchises was measured by the dividends of the corporation in the current year and held to be constitutional. This court in considering the objection that such a scheme was in conflict with the Fourteenth Amendment declared (p. 1032):

> But the amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between licenses, franchises and priv-

ileges, and visible and tangible property, and betweeen real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection, if all such bodies are treated alike under similar circumstances and conditions, in respect to the privilege conferred upon them, and the liabilities to which they are subjected.

Under the statute of New York all corporations, joint stock companies and associations of the same kind are subject to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class.

In this decision the court assigned the reason above suggested for the difference between the tax laid upon an individual and upon a corporation, arising from the fact that one has artificial rights and privileges conferred by law which the other has not.

This court has likewise sustained various State laws establishing railroad commissions, fixing tolls and charges by railroads, water rates, gas rates and the like.

The recent case of *Bank of California v. Richardson,* 248 U. S., 476, so confidently relied upon by counsel (B., pp. 49-65), is clearly distinguishable. It involves alone the construction of Sec. 5219 of the U. S. Revised Statutes, *and no provision of the Fourteenth Amendment was brought in question.*

E. THE BACK TAX ACT.

a. *Retrospective Tax Laws Not New.*

In almost every State of the Union there have existed for many years statutes expressly authorizing proceedings in various forms for the recovery of taxes past due. These laws preserve no uniformity of scope or type and are almost as diverse in their provisions as are the internal structures of the revenue systems themselves.

Among the States which have enacted and upheld back tax measures are Connecticut, Illinois, Kentucky, Louisiana, Mississippi, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New York, Ohio, Oklahoma, Tennessee and West Virginia.

Citations to the various statutes would unduly burden this argument and a reference will suffice to the treatment of the subject in 37 Cyc., at page 1020, where the numerous authorities are grouped.

The Back Tax Act now under review has received at the hands of the Arkansas Supreme Court a most thorough and exhaustive consideration in a test case wherein every aspect of the law was exhibited and its validity subjected to a crucial examination. The State court having the cause under advisement for a full year sustained the Act in every particular.

> State *ex rel.* Wm. L. Moose, Attorney General v. Kansas City & Memphis Ry & Bridge Co., 117 Ark., 606; 174 S. W., 248.

Quoting from the opinion (at pp. 624-5):

> We conclude that the statute in controversy is not a statute for the classification of property

for taxation. It was a legislative determination that property then within the jurisdiction of the State had in past years escaped the payment in whole or in part of its just proportion of the burden of taxation, by reason of not having been assessed, or valued upon a wrong basis, or by reason of having been undervalued, and that it was for the best interest of the State that a remedy should be provided whereby the amount which should have been assessed against certain property may be ascertained and the property forced to contribute the full amount of its proportionate share of taxation. We cannot say that the failure to include within its terms individual as well as corporate property was an arbitrary discrimination against corporations. It cannot be presumed that its enforcement will result in unequal taxation. It should rather tend to make it equal and uniform.

The payment of a part of the amount justly due did not release the tax debtor from his obligation to pay the balance. That one is compelled to pay what he justly owes while others are not sued, is not an infringement of any constitutional right, nor even a just cause of complaint. To compel all to be sued might result in such a burden of litigation as to make it not worth while to sue any. This was a matter for the exercise of the legislative judgment and discretion.

The legislative power to provide for the collection of taxes remaining unpaid by reason of an insufficient assessment or a failure to assess, cannot be made to depend upon the cause or reason for the insufficient asessment or omission to assess; nor upon whether the action complained of was actually or constructively fraudulent, or the result of a mere error of judgment; nor upon whether there was a gross undervaluation or an undervaluation in less degree; nor, upon whether the

property escaped taxation entirely or only in part; nor whether the amount due is large or small.

Section 5, Article XVI, of the State Constitution, is satisfied by assessments and fixed methods of collection of taxes according to the same rate and proportionate valuation and applies to prospective statutes only. It has no application to statutes which only provide a remedy for the collection of taxes already past due. It was not intended to afford constitutional protection to the owner of property which has escaped taxation against the enforcement of his obligation unless all others similarly situated are compelled to pay.

While the general jurisdiction of courts of equity to correct errors in assesments is confined to cases of fraud or mistake, the power of the Legislature in that respect is not limited.

The fact that no statutory remedy exists for the correction of an erroneous assessment at the time it is made does not preclude the Legislature from granting a remedy at a subsequent time. We are unable to find that the Act in controversy violates any constitutional provision of either the State or Federal Constitution.

The Act was passed in 1887. The suits brought under its provisions by the Attorney General in office at the time of its enactment are interesting chapters of the State's financial history. Subsequent recoveries by his succesors have brought the aggregate to nearly a million dollars.

In asking this court to approve the validity of the Arkansas Act, we rely upon two broad and familiar propositions:

First, Federal Courts will follow the decisions of the highest court of a State upon a question of mere construction.

Second, the taxation scheme of a State will not be overturned by this court unless its provisions are clearly and palpably in conflict with the Federal Constitution.

The general principle behind all similar statutes is sound, ethical and just.

"Taxes are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative."

The above terse statement from the opinion of this court in the *Florida Central Railroad* case, 183 U. S., 471; 46 L. Ed., 283, is adopted as text by William Meade Fletcher in his Cyclopedia of Corporations, Section 4617, page 8153.

This court has considered and upheld in many cases the validity of Back Tax laws of several States. Notable among them are the following:

Sturges v. Carter, 114 U. S., 519; 29 L. Ed., 240.

League v. Texas, 184 U. S., 156; 46 L. Ed. 478.

Winona & St. Peter Land Co. v. Minnesota, 159 U. S., 526; 40 L. Ed., 247.

King v. Mullins, 171 U. S., 404; 43 L. Ed. 214.

Weyerhauser v. Minnesota, 176 U. S., 550; 44 L. Ed. 583.

Florida, C. & P. R. Co. v. Reynolds, 183 U. S., 471; 46 L. Ed. 283.

Security Trust Co. v. Lexington, 203 U. S., 323; 51 L. Ed., 204.

Citizens Nat'l Bank v. Ky., 217 U. S., 443; 54 L. Ed., 832.

Kentucky Union Co. v. Kentucky, 219 U. S., 140; 55 L. Ed. 137.

b. *Constitutionality of the Amended Act is Not Impaired Because Leveled at Corporations Alone.*

The argument is pressed by counsel that there should be no distinction in the taxation of property growing out of mere ownership or title thereto; that a specific article belonging to a corporation should be assessed at no more or no less than the same article belonging to an individual.

Those who urge this point surely do not clearly visualize the essential and distinctive character of "corporate property," a term which by long usage is firmly engrafted into the genius of the law of Arkansas.

What is a corporation?

Perhaps no better explanation of the corporate function has ever been framed than the famous dictum of Chief Justice Marshall, which emphasizes the notion of legal entity:

> A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.
>
> Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.
>
> They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that

> corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.
>
> Dartmouth College v. Woodward, 4 Wheat. (U. S.), 518, 638; 4 L. Ed., 629, 659.

The definition by Justice Story in his concurrent opinion in that celebrated case is brief but clear (p. 667):

> An aggregate corporation at common law is a collection of individuals united into one collective body under a special name and possessing special immunities, privileges and capacities in its collective character which do not belong to the natural persons composing it.

Likewise the characterization in the New York decision by Justice Brandon in People v. Watertown, 1 Hill, 620:

> A collection of individuals united in one body by such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person or legal entity, capable of transacting corporate business like a natural person.

This, then, is the gist of the whole distinction. Corporate property is that whose ownership or title is vested in a "collection of individuals," who *ipso facto* possess and and enjoy those "certain immunities, privileges and capacities" which are denied to natural persons, or even to those individuals *per se* who compose the corporation's *personnel.*

Because then of the technical and privileged status of the artificial person known as the private corpora-

tion, different economic considerations are invoked when its relation to the outside world is viewed; not that the property owned by the corporation is of itself necessarily different in character from that owned by individuals, although this is quite frequently the case, but because of the legal and elevated status of the property, growing out of its control by the corporation and its restricted relation to the outside world, including the public, which gave being to the corporation.

So great is the advantage bestowed upon a corporation through the statutory genesis which gives it birth that it would seem to be assumed without argument that this advantage carries with it a correspondent obligation to so deport itself as to meet all the requirements of the State, both as to conduct and as to reciprocal support by way of taxation.

RESERVE RIGHTS OF THE STATE.

Another reason exists for discrimination in the treatment of property owned by corporations and coming under the general term "corporate property." A corporation is a creature of the State. It is presumably incorporated for the benefit of the public. It receives special privileges and franchises and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and ascertain if it has exceeded its powers.

Wilson v. United States, 221 U. S., 382; 55 L. Ed., 771; Ann. Cas., 1912A, p. 558.

Ozan Lumber Co. v. Biddle, 87 Ark., 587; 112 S. W., 177.

The Fort Smith Lumber Company was granted its charter by the State of Arkansas on December 1, 1896 (R., 1), and voluntarily entered upon a corporate existence as affected by all existing laws of the State, including the applicable revenue laws and the Back Tax Act, then already on the statute books.

Even in the absence of an express act, there is good reason to hold, as the Arkansas court has intimated *obiter dictum,* that the State has *a common law remedy* for collecting any amount which may be due her by reason of delinquency or omission on the part of certain taxpayers.

> State *ex rel.* Norwood v. New York Life Ins. Co., 119 Ark., at page 328, and cases cited.

In such a status is it consistent to say that the State cannot move except against all her delinquents at once? Is the power of selection wanting in the Legislature? Is this court the arbiter of the State's actions in regard to her own revenues? Has she no choice with respect to direction or methods in pursuing her own business?

(1) As to the validity of the Back Tax Act.

In the most recent compilation of law of private corporations, the Cyclopedia by William Meade Fletcher, we quote the following from the text of the article on Taxation, Vol. 7:

> Sec. 4617.—Back Taxes.
>
> Taxes are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment

the State may proceed by all proper means to compel the performance of the obligation.

"No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation. So it is that the State may compel a corporation to pay taxes for past years, or "back taxes," as they are called, if there was a valid law under which they should have been paid, where payment has been evaded by the corporation, or where the tax officers have failed to levy and collect the same through negligence or mistake of law or fact.

Where the charter of a railroad company required it to pay an annual tax not exceeding a certain share of its capital stock, whenever its annual profits should exceed 6 per cent. and the company evaded payment for twenty-five years, it was held that it could be compelled to pay for all of these years. This decision was put upon the ground that the State's right to the taxes was a contract right, the tax being imposed by the charter of the corporation as the price to be paid by it or its shareholders for the franchise.

But the right of the State to assess taxes against a corporation for past years, during which it has escaped taxation is not limited to such cases. It extends as well to taxes otherwise imposed.

A property-owner has no vested right in an immunity from taxation which has been obtained illegally, and hence cannot complain when a back-tax statute deprives him of that immunity by making it possible for the State to obtain income to which it is entitled.

"The right of taxation," says the Supreme Court of North Carolina, "is the highest and

most essential power of government * * * and is necessary to its existence. All who are liable to the payment of taxes should pay their legal share. Those who fail to do so simply devolve its payment upon others, for, taxes being essential to the existence of government, if any do not pay others have to pay for them. It justly follows that if taxes are not paid within the statutory time, the Legislature can authorize the collection of such arrearages notwithstanding."

The taxing power when exercised within its legitimate sphere is one which knows no stopping place until it has accomplished the purpose for which it exists, namely, the actual enforcement and collection from every lawful subject of taxation of its proportionate share of the public burdens, and, when halted short of this objective, such power may be exercised again and again until contribution has been made.

Even "the fact that the public expenses have been paid for the years in which the taxes were omitted, or that the particular public purposes for which they were originally required have been met with other funds, or that the collection of the omitted taxes may temporarily create a surplus of public revenue, presents no constitutional ground why omitted property should continue to escape its due share of taxation. When collected, these taxes will still belong to the public, and, like any other surplus, be subject to future appropriation, and thereby lessen future taxation upon those who have already paid more than their share." The tax officers, however, cannot assess back taxes without legislative authority.

"Authority to assess property because of its omission from taxation in previous years," says the Appellate Court of Indiana, "must be derived

> from the terms of some statute, considered according to its meaning, and the intent of the Legislature shown thereby. If the language employed may be construed as relating to assessments for the current year only, it will not be extended to embrace the special and exceptional assessment of property omitted in previous years." * * *
>
> When the Legislature does act in the matter, however, it may provide for the collection of back taxes on realty and not on personalty without violating any provision of the Federal Constitution. Moreover, the question whether it has so provided is not one for the Federal Supreme Court but the determination thereof by the State Supreme Court is final.

One of the earlier decisions of this court, recognizing the validity of the Back Tax laws, is the New York case of *Williams v. Supervisors of Albany,* 22 Blatchf., 302, 122 U. S., 154; 30 L. Ed., 1088, decided May 23, 1887.

In the oft-cited case of *Sturges v. Carter,* 114 U. S., 511; 29 L. Ed., 240, the Ohio Act of 1878, providing, as does the Arkansas Back Tax Act, for the correction of returns for taxation previously made, is held not retroactive under the inhibition of Sec. 28, Art. II of the Constitution of Ohio. It merely gave the State a new remedy for an existing right. In passing, the court said (pp. 518-9):

> In substance, this contention is that a taxpayer who has been evading the payment of the taxes due from him by making false returns can shield himself behind the annual settlement made by the auditor with the treasurer, in which his returns were assumed to be true, and that the Legislature can pass no Act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in other words, that the taxpayer

has a vested right in the fruits of his false returns. Such a proposition cannot be sustained. Foster v. Essex Bank, 16 Mass., 245.

In our opinion, no right of the taxpayer was invaded by the Act of 1878. His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the State and the Act merely provided a method by which the taxes might be assessed and collected in spite of the annual assessments made by the auditor. It gave a new remedy to the State for enforcing a right which it had all the time possessed, viz: the right to the taxes upon property liable to taxation.

c. *The Amended Act Is Not Repugnant to the Fourteenth Amendment.*

Applying the doctrine of this case to the suit at bar, the Arkansas Legislature did not transgress its authority in the passage of the Act of 1887. In view of the current history of the times, it manifestly conceived that the State had been losing substantial sums of money in the form of accumulated taxes due from property within its confines, which had been escaping its due burden of taxation. The first evidence of the evil was the substantial amount of taxes which had been lost by omissions in the assessment of real estate. Thus originated the Overdue Tax Act of 1881, and the numerous proceedings thereunder, which have been consistently upheld in principle by the State Supreme Court.

Next followed a realization of the very large amounts which had escaped taxation from the railroads then coming into great prominence, both commercially and politically. The recent revisions of the Constitution—in 1868 and again in 1874—crystallized the revulsion of public sentiment toward capitalistic enterprises.

The birthright of the State had ruthlessly been squandered by those in authority and even by the Legislature itself. Witness the numerous land grants, bounties and donations extended to railroad and other transportation corporations. The generous schemes for the taxation of railroads had undergone a complete change. Tests had been made of the new provisions and many were found to be invalid. Incidentally, the fiscal house-cleaning disclosed the fact that much of the State's corporate property had completely escaped taxation.

In view of the technical character of corporate organization and the necessity for an appropriate system of valuation in order to reach all the values residing therein, the Legislature of 1887 boldly attacked the formidable task. While revising its revenue law so as to stop the ruinous leaks discovered by the courts, a means was also provided for re-examining past assessments in order to regain by process of law what the State had lost. The purpose was further manifest to make the scheme so complete that all such evasions in the future might be caught in the judicial drag-net by proper and orderly procedure.

No provision in the Back Tax Act imposes any new obligation or duty upon railroads or other corporations. It simply provides a special remedy whereby the duties and obligations elsewhere imposed may be enforced against delinquent members of the class thus advisedly selected.

The statutes of the American States bristle with instances of a fateful and often fitful classification of persons and of things. Many instances, appearing on their face purely arbitrary, have been accepted as if by common consent. In Arkansas, for example, we have varying statutes of limitation—one, two, three, five and seven years; unequal requirements as to the number of individuals necessary to co-operate before

the modern "benefit of clergy" or statutory bounty may be available—witness the right to a corporate charter; mechanical rules for corroboration of evidence in certain cases (*e. g.*, divorce proceedings) not imposed in others; diverse standards prescribed to meet that *sine quo non*—the jurisdiction of the courts where alone all civil rights may be asserted. The catalogue of apparent inconsistencies might be prolonged indefinitely, but this enumeration sufficiently illustrates the recognized principle which permits a wide range of legislative discretion with respect to the *selection* of its subjects as well as their ultimate treatment and disposal.

A FEW INSTANCES OF APPROVED CLASSIFICATION.

The same principle controlled in the following cases:

St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 64 Ark., 83; 37 L. R. A., 504; affirmed in 173 U. S., 404; 43 L. Ed., 746 (upholding Act of 1889, requiring railroad companies to pay discharged employees without deduction, etc.).

Chicago, Rock Island & Pacific Ry. Co. v. State, 86 Ark., 412; 111 S. W., 456; affirmed in 219 U. S., 453; 55 L. Ed., 290 (upholding Acts of 1907, page 116, Full Crew Law).

Ozan Lumber Co. v. Biddle, 87 Ark., 587; 112 S. W., 177 (upholding Fellow-servant Act of March 8, 1907).

Aluminum Company of North America v. Ramsey, 89 Ark., 522; 117 S. W., 568; affirmed in 222 U. S., 251; 56 L. Ed., 185 (abolishing fellow-servant rule as to certain corporations).

See also the following decisions:

Gallup v. Schmidt, 183 U. S., 300; 46 L. Ed., 207 (upholding the Indiana statute, providing for the assessment of omitted property belonging to estates of deceased persons—154 Ind., 196; 56 N. E., 443). The court said at page 307:

> It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered (citing numerous cases).

In *Savings & Loan Society v. Mulnomah County,* 169 U. S., 421, 42 L. Ed., 803 (holding that the taxation of mortgaged real estate by taxing the mortgagee's interest therein to him and the rest to the mortgagor is not double taxation).

Ozan Lumber Co. v. Union County National Bank, 76 C. C. A., 218; 145 Fed., 344; reversed in 207 U. S., 251; 52 L. Ed., 195 (this court upholding Kirby's Digest, Section 513, requiring negotiable instrument taken in payment for patented article to so show on its face).

Hammond Packing Co. v. State, 81 Ark., 510; 100 S. W., 407, 1199; affirmed in 212 U. S., 322; 53 L. Ed., 530 (upholding Arkansas Anti-Trust Act of 1905).

St. Louis Southwestern Ry. Co. v. State, 106 Ark., 321; 152 S. W., 110; affirmed in 235 U. S., 350; 59 L. Ed., 265 (upholding franchise tax). In the course of the opinion by Mr. Justice Pitney, these words occur at page 362:

> Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the court.

The statute was then subjected to the acid test, which this court is wont to apply to all laws here challenged for an alleged infringement of the rights guaranteed by the Federal Constitution, and at page 367 of the opinion the argument continues:

> Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the states with respect to their internal taxation, *or prevents them from imposing double taxation,* or any other form of unequal taxation so long as the inequality is not based upon arbitrary distinctions.
>
> Stanton v. Baltic Mining Co., 240 U. S., 103; 60 L. Ed., 546.

d. *Consensus of Economic Opinion.*

CORPORATE TAXATION INHERENTLY DIFFICULT—COOK'S VIEWS.

That most eminent commentator on corporation law, Mr. William W. Cook, writing from 15 Wall St., New York, in a treatise on "The Corporation Problem," thus compares the corporation and its business competitor, the partnership (pp. 2 and 3):

> The partnership is restricted in its capital, dangerous in its liabilities, narrow in its exclusion of new members, too free in its mode of making contracts, and too contracted in its opportunities for withdrawal. It is becoming obsolete as a mode of doing business on a large scale.
>
> In a corporation, all this is changed. The members are not liable for the debts. The amount already invested may be lost, but the private fortunes of the stockholders are not involved. The business is done and contracts made, not by all, but by a select few, called directors. A large capital is created by the union of funds from many sources. A person may safely invest in many enterprises and yet not take part in the management nor watch the business of any one of them. The leading spirit in an enterprise may hold a majority of the stock and may admit associates, employees or strangers, as holders of a minority of the stock, and yet he will retain the management as though he were the single owner of the concern. Persons may easily buy into or retire from the enterprise.
>
> Dissolution is not brought about by the death or withdrawal or dissatisfaction of a stockholder. The insolvency of a stockholder does not affect

the business of the corporation. Upon the death of a stockholder, his executor votes his stock and has a voice in the continuation of the business. A stockholder may sell or pledge his interest readily and intelligently by reason of the reports, dividends, and market quotations of his stock.

The corporation is a protection in that the liability is limited; it is capable in that it renders possible the collection of a great capital; it is efficient because the directors, and they alone, govern its policy and its contracts; and it is convenient because it is easy to sell or buy or pledge or bequeath one's interest in the concern. Under its protection and concentrated power men will undertake great enterprises involving great risks or losses or gains. The corporation has rendered possible the modern era of industrial development.

It is by reason of all these facts that corporations have come into universal use. They have absorbed the railroad, banking, insurance, manufacturing, mining, telegraph, telephone, gas, express, waterworks, commercial, turnpike, bridge, canal, steamship, financial and other industrial business of the country.

At page 89 the author quotes Prof. Amos G. Warner as saying:

"The advantages of business secrecy * * * are countervailed by very serious disadvantages. Experience seems to have demonstrated quite conclusively that a being at once so vulnerable and so powerful as a corporation cannot afford to keep its affairs entirely to itself; and if it could afford to do so, the public cannot afford to let it."

And at pages 105-6, so calm and judicial a writer as Judge Cooley, who says:

"It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence."

Referring to the capital stock tax in New York, Mr. Cook continues (p. 201):

Moreover, it has been found generally that it is well nigh impossible to collect this tax. The companies evade it and pay only at the end of long and strenuous litigation. To such an extent is this invasion carried in New York that in some cases the tax has been abandoned, and a statute has been passed requiring the company to pay to the city a certain percentage of its gross receipts.

But there are fundamental defects in all of these statutes. They are difficult to enforce, because the companies conceal the full amount of their receipts. Not even the right of the State or city to investigate the amount of receipts is sufficient to prevent these frauds. Moreover, the amount received in taxes is infinitesimal compared with the value of the natural monopoly itself (*Ib.*, pp. 203-4).

The corporation is the ally, the agent, the representative, of plutocracy. To a small extent, corporation bonds and stocks are owned by the many. But the control, the management, and the ownership of the great corporations of the land are today in the hands of the wealthy few. Plutocracy has appeared in a new guise, a new coat of mail—the corporation. The struggle of democracy against plutocracy—a struggle that is com-

ing to the American people—will be between democracy and the corporation. The people are beginning to recognize their old plutocratic foe in its new corporate form.

And the corporation is no mean ally. It gives to plutocracy a power which it never before possessed. Private fortunes in corporate form, and by legal sanction, have rapidly and enormously increased, until now the American republic has to deal with aggregations of capital, such as the world has never before beheld. There has resulted a concentration of wealth that past ages never dreamed of, and private fortunes exist which surpass those of Babylon and Rome. The corporations have made the plutocrat more wealthy and more powerful than ever before.

Nor is the corporation tempered by any of the amiable weaknesses of plutocracy. There is a great difference between wealth as used by the owner himself, and wealth as used by the corporation. When the capitalist invests and administers his wealth himself, his humanity asserts itself; his sympathy, generosity, gratitude, sense of wrong, sensitiveness to public criticism, and aversion to public dislike—all tend to prevent harshness and injustice in the use of his power. But with the advent of the corporations, these restraints are passing away. Fifty years ago, wealthy men were identified with their investments. Today, with a few exceptions, the great enterprises are not connected in the public mind with individual names.

Corporations have separated the investor from the investment. The millionaire uses the corporation to invest his property. He owns the stocks and bonds; controls the corporation, and makes it do his bidding. But all acts in the man-

agement of the property are done, not in his name, but in the name of the corporation. If corrupt and unscrupulous, the odium and disgrace rest upon the corporation, and not upon the individual. Take it all in all, the corporation is as perfect and heartless a money-making machine as the wit of man has ever devised.

The corporation *is* dangerous to the republic. It has become the tool of plutocracy. It has increased the historical dangers to government from the concentrated wealth of the few. It has been instrumental in increasing that concentration of wealth and in shielding its owners from risks and opprobrium arising from its illegal use. It is without moral responsibility or feeling. It can do more harm than individuals, and, in so far as plutocracy is a danger to the republic, the corporation has increased that danger. (*Ib.*, 249-51.)

PROF. WILGUS' VIEWS.

At the annual meeting of the American Bar Association for 1904, Prof. Horace L. Wilgus of the University of Michigan delivered a scholarly address on "Federal Incorporation," and in the course of his remarks, said (27 Am. Bar Assn. Rep., pp. 694, 703):

It is not the State's function to produce or distribute wealth, but it is properly its function to just and equal laws to foster the economic production and equitable distribution of wealth. In doing this, it very properly creates or authorizes the creation of corporations, and what steam and electricity have been to the material world, the corporation has been to the business world, the one greatest and most efficient machine yet devised to strengthen the hands of man and add energy to his capital. Its very nature and efficiency make it also peculiarly susceptible of abuse, and the state

that gives the privilege should provide reasonable protection against and adequate remedy for such abuse.

DR. MATHEWS' VIEWS.

Dr. John Mabrey Mathews of the University of Illinois, in his recent treatise on "Principles of American State Administration," says:

> Moreover, the assessments were to be made upon the basis of the statements of cost, receipts, *et cetera,* returned by the corporations themselves, and no adequate means was provided for compelling the making of the returns, nor for verifying the returns when made, through inspection of the books and accounts of the corporations.
>
> The assessments under these acts, therefore, practically amounted in large measure to self-assessment by the corporations. The results of this feebleness of central control are seen in New Jersey, where disputes frequently arose between the State Treasurer and the railroads respecting the amount of taxes due, and investigations showed that mistakes had been made involving the loss of thousands of dollars to the State.
>
> These conditions gradually forced the conviction that existing methods of taxing corporations were inadequate, and that, in order to make corporate property bear its just share of the general tax burden, a greater degree of central control over the administration of the taxes upon such property would be necessary (pages 253-4).
>
> A few years ago, Michigan, Wisconsin and New Jersey made an earnest effort to tax railroads on the *ad valorem* basis, and, at considerable expense, made a detailed valuation of the

property of railroads within their respective boundaries.

In order to be successful, however, this method requires *continuous vigor and unremitting vigilance* in administration on the part of the state taxing authorities, which cannot always be assumed to exist in most states (page 259).

Although, as already noted, we find in some states a general corporation tax, the tendency is toward the division of corporations into classes according to the kind of business transacted, and the imposition upon each class of a special tax levied at a different rate or in a different manner. This tendency is accentuated by the adoption of earnings in place of property as the basis of taxation. Under this system, even corporations falling into the same general class may be broken up into smaller groups and a different rate applied to each. * * *

Consequently, reasonable classification of corporations for purposes of taxation should be made by the Legislature in so far as the Constitution permits (pp. 262-3).

PRESIDENT HADLEY'S VIEWS.

It is pointed out by Dr. Arthur Twining Hadley in his standard work on "Economics" (p. 93), that under the commercial theory the market price represents the temporary value of an article and the normal price representing its permanent value. "Value being essentially an ethical term, we may have as many different theories of value as there are different views of business ethics. But these views fall under two main heads—the commercial or competitive theory, which bases value upon what the buyer is willing and able to offer for an article; and the socialistic theory,

which bases it upon what the article has cost the seller in the way of toil and sacrifice." * * *

"Price is a fact. A value is an estimate of what a price ought to be."

The author further elaborates the idea at page 454:

> Section 504. In the assessment of corporate property, as in that of real estate, no deduction should be allowed for indebtedness. * * * The tax should reach *the whole property of the corporation* without reference to the question of its ownership. In that way, and in that way only, will it be evenly distributed.
>
> If the market price of the securities is used as a means of ascertaining the value of such property, bonds as well as stocks should be included in the estimate. It affords opportunities for evasion no less than for injustice if two railroads, physically alike, pay different rates of taxes because the capital of the one was largely borrowed, while that of the other was subscribed.

Can such an elusive concept be grasped by the average layman when it baffles the doctors?

LYON ADMITS CORPORATIONS GAIN BY LAX ADMINISTRATION.

An eminent attorney and economist, Mr. W. Hastings Lyon, in his book on "Principles of Taxation," though obviously very friendly to corporations, in the chapter entitled "Are Corporations Taxed Too Little?" tacitly admits the pecuniary advantage accruing to corporations because of the inherent difficulty of their assessment. He says:

> If the facts afford any foundation for the feeling that corporations do not pay their proper share of taxes, they do so *on account of assessments* and not on account of taxes provided.
>
> So far as assessments may have been defective, the fault has been due to *lack of expert knowledge* on the part of assessors who have not known how to value the special forms of property owned by corporations. * * * The remedy for any failure of equality appears to lie in centralizing the administration. This could provide the necessary experts to make the proper valuations.

The author closes the chapter with the criticism of the principle of "corporate excess" taxation in language which we shall quote; not that we acquiesce in the reasons assigned, which, indeed, seem far-fetched, but for the reason that even in the mind of this professed advocate of leniency toward corporations, some grounds exist for the special treatment under discussion (pp. 118-19):

> Is there sufficient reason for this extra taxation of corporations? Taxes levied go way beyond the cost of the corporate form to the states. It increases ability to pay, if at all, only in indirect ways, as in *enabling capital to be massed* for the undertaking of enterprises so large as not generally to be possible for individuals.
>
> Let us apply the benefit theory of taxation to see if we can on any theory find a justification for this special taxation of corporations. Does the State bestow any such special benefit on those who seek the corporate form that it is justified in taxing them on account of it?
>
> *Limited liability* is the most important gift of the State to a corporation. This especially

helps in that massing of capital we have just spoken of. It is important to the State that enterprises requiring large amounts of capital should be undertaken. That might sufficiently offset whatever special privilege is given to the individuals forming the corporation. Limited liability really imposes no disadvantage on people in general. If they deal with a corporation, they realize the limited liability and make terms accordingly.

Perpetuity and other characteristics of a corporation are merely characteristics of a business device, and do not afford any better reason for taxation than the characteristics of any other business device, such as a bill of lading which has proved greatly useful in business practice and therefore may be said to confer a benefit on the user. Doubtless, if the State should tax the use of a bill of lading, shippers would continue to use it and endure the burden because of the convenience of the device. Such taxation, however, depends on the diea of what the traffic will bear, and has no relation to any fair principles of taxation.

FEDERAL COMMISSION SPEAKS.

In the most comprehensive investigation of industries that was ever undertaken by any government, the general subject of taxation of corporations was carefully treated, and we find in Vol. XIX, being the final report of the Industrial Commission, Washington, 1902, at page 1065, a summary of conclusions as follows:

> While State taxing officials, tax commissioners, and writers upon taxation, with considerable justification, inveigh against the efforts of individuals and corporations to evade and escape taxation, it should in justice be said that there is a lack of ap-

preciation of the fact that the principal cause of these conditions is inherent in the system itself, rather than in a general desire to avoid just taxation.

In all the States vast amounts of property are virtually exempt from taxation, and other property is unjustly and grievously burdened through the operation of bad systems and injudicious laws. It is useless to inveigh against tax dodgers and faulty administration, unless the methods of taxation are changed.

Representatives of corporate management and others are animated usually not so much by the fear of "equal taxation" as of unequal taxation under prevailing systems. When methods are adopted based upon correct principles that will subject corporations and intangible forms of property to just and proportionate burdens as to public revenue, the opposition to enforcement of tax laws and the efforts to evade their burdens will be abated, and the correct methods will be more easily enforced.

The summary closes with this comment upon a leading decision of this court (p. 1067):

A mistaken conception of the property-tax-theory of "uniformity" and a general disposition to apply the misleading iron rule of "equal taxation" to all forms of property exist very generally. As bearing upon this observation, we quote the following from the case of Pacific Express Company v. Seibert (142 U. S., 351):

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens

or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms, and that a system which imposes the same tax upon every species of property, irrespective of its nature, condition, or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

A question somewhat analogous to the one immediately before us is presented in the case of *People ex rel. New York Clearing House Co. v. Barker et al., Commissioners,* 179 U. S., 279, 45 L. Ed., 190, where this court refused to overturn a revenue statute of New York.

The tax law of that state, which, as is well known to the bar, is singularly confusing and clumsily constructed, permitted conflicting claims, such as have by this record arisen in Arkansas, because of the different statutes, one of which provides for the taxation of corporations, their capital stock and surplus, and another, for the taxation of real estate belonging either to individuals or corporations.

The New York statute requires an assessment (at actual value, in the same manner as other personal and real estate) of the capital stock of every company, save certain exempted and excepted portions thereof, "after deducting the assessed value of its real estate and all shares of stock in other corporations which are taxable upon their capital stock." Laws of 1857, Chap. 456, Sec. 3.

By construction of the highest state court (People *ex rel.* Union Trust Co. v. Coleman, 126 N. Y., 433; 12 L. R. A., 762; 26 N. E., 818; People *ex rel.* 23d St. R. Co. v. New York Tax Commissioners, 95 N. Y., 554; People *ex rel.* Equitable Gas Light Co. v. Barker, 144 N. Y., 94; 39 N. E., 13, and People *ex rel.* Manhattan

R. Co. v. Barker, 146 N. Y., 304; 40 N. E., 996), these principles had been enunciated:

(1) The general purpose of the statutes is to secure an assessment of all property, real and personal, at actual value, and they are to be construed and enforced with this purpose in view; (2) the phrase "capital stock" means, not the share-stock owned by the individual members, but the capital owned by the corporation; (3) and in arriving at the actual value of the capital, the assessed value of the real estate made for purposes of separate taxation is not conclusive if that assessment were a mistaken one, but may legally be disregarded, the real estate be estimated at its actual value, although that exceed the assessed value.

The single federal question presented, therefore, was based upon the necessary operation of the statutes which, it was contended, were inherently discriminatory in that for individuals "no resort can be had to any other proceeding by which the tax can be increased by any subsequent assessment upon the difference between the assessed and actual value of the real estate, if any there should be. In the case of corporations, on the contrary, * * * if the real estate should be mistakenly assessed under the general statute, at an undervaluation for purposes of separate taxation, the difference between the assessed and actual value of the real estate may be reached in making an assessment upon the actual value of the capital."

At this point we pause to make a comparison. The Arkansas law stands construed by the highest court in that state.

> State *ex rel.* Attorney General v. K. C. & M. Ry. & Bridge Co., 117 Ark., 606; 174 S. W., 248.
>
> State *ex rel.* Attorney General v. Bodcaw Lumber Co., 128 Ark., 505; 194 S. W., 692.
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> State *ex rel.* Attorney General v. Fort Smith Lumber Co., 131 Ark., 40; 198 S. W., 702; on second appeal, 137 Ark., 211 S. W., 662.

The Amended Back Tax Act, now denounced by counsel as discriminatory because applying only to the property of corporations, has been construed by the Arkansas court of last resort, and upheld as valid and constitutional. True resort can be had to its instrumentality for the purpose of recovering overdue taxes on only the property of corporations. Underassessment of property owned by individuals is not placed within the purview of the statute. But limitations upon the operation of such statutes do not, it is held, constitute vices, but are reasonable qualifications entirely within the province of the legislative discretion to impose.

So far as the gist of plaintiff in error's grievance reaches, the net result is parallel to that complained of in the New York case. But this court met the objection in these words (at p. 283):

> It must be remembered there is no claim made that in any event the corporation is taxed upon any property not legally taxable, or that it is taxed beyond the actual value of its property as provided by law. The only claim is that in this opportunity to correct a mistaken assessment

upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws.

(N. Y. Clearing House Building Co. case, *supra*, 179 U. S., 279; 45 L. Ed. 190.)

And again let us strike a comparison: No claim is made or can be entertained that the Arkansas statute by its terms, or as judicially construed, seeks to subject a corporation to any tax upon its property which is not legally due, or to tax its property beyond its actual value under the general provisions of the revenue law. Indeed, the objection to the law of the present case grows out of the peculiar self-imposed legal status of the plaintiff in error, whose holdings in subsidiaries, as such, are unquestionably protected by the laws of Arkansas under which both parent and subsidiary derived their breath of life.

This court in passing upon the Now York statute adverted to the fact that the laws of that State provide for no under-valuation of real estate owned by either individuals or corporations and remarked, "If there were no undervaluation or real estate; or in other words, if the laws of the State are complied with, the question sought to be raised by the plaintiff could not arise. * * * If the law were faithfully carried out, no harm could in any event come to the plaintiff in error by this subsequent assessment of its real estate at its full value, for it would only pay the same as individuals, they being assessed on their real estate at its full value."

So in Arkansas no corporation which has properly paid taxes upon all of its corporate property, in accordance with the several provisions of the revenue laws, can be unjustly mulched for an additional exaction. The reason is obvious. Any proceeding for

back taxes must be under the direction of the courts, which presumably will construe the laws evenly and impartially. As aptly remarked by this court in the New York case under discussion, "the mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws so long as the real estate of the individual is in fact generally assessed at its full value."

And so we earnestly submit that when the Back Tax Act, in contemplation of the peculiar and intricate character of corporate property, authorizes a second inquiry into the record of its assessment through the avenues of the courts of equity—a judicial recheck—certainly this procedure cannot constitute a denial to the corporation of the equal protection of the laws.

Admitting the justness of "classification" as already authorized in the prescribed routine, can it reasonably be said that a statute transcends any vested right of a corporation when it merely provides that as to such property, admittedly requiring technical and special treatment, the State, through its selected agents and employees, may go over the ground again and recheck the efforts of her regular officials by subjecting the tax roll to the scrutiny of experts?

The Federal Government itself long ago set the example by its practice of auditing and rechecking the assessments for excise and income taxes for the purpose of making claim for and suing to recover any omitted residue.

The Arkansas classification, confining back tax suits to corporate property, is more logical and scientific, as well as more favorable to affected delinquents, than the Florida statute, which was upheld.

The peculiar attributes of corporate property *per se* and the privileges and advantages enjoyed by its

owner as distinguished from those of individually owned property are too numerous to require further elaboration in this brief.

CONCLUSION.

We have endeavored in our argument to give a correct exposition of the Arkansas revenue law; to show that, as it applies to corporations, it has been thoroughly settled by both legislative and judicial authority; that its status today results from a logical and consistent development growing out of the State's history and successive adjustments of fiscal policy; that under such development the construction of the court below, in holding that corporations are not entitled to deduct from the taxable valuation of their capital stock the amount of their investments in subsidiaries, is not only inescapable, but is essentially sound and just, and that the Back Tax Act of 1887, as now amended, offers a just and constitutional remedy for subjecting corporate property to a judicial inquiry for the purpose of recovering any taxes lawfully due thereon for past years by reason of under-assessment or omission.

The inhibition of the ancient Levitical law against making a "clean riddance of the corners" does not apply to the taxation harvests of today. It is manifest that to do the work well in the corporate wheat-field, the *gleaners* must follow the reapers. By no other plan can the public revenue be gathered in full.

We confidently submit that the decision of the Supreme Court of Arkansas in this cause should be affirmed.

Respectfully submitted,

JOHN D. ARBUCKLE,
Attorney General of Arkansas;

GEORGE VAUGHAN,
Special Counsel.

Little Rock, Ark., December 24, 1919.

THE BACK TAX ACT.*

Sec. 7204. [As amended, with the words added by the second amendment in italics and those omitted from the original section in brackets, reads as follows]:

(Sec. 1.) Where the Attorney General is satisfied from his own investigations, or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned *or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof,* or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation [or] upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, that it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may

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*Act March 1, 1887, as amended by Act 354 of May 20, 1911 (Acts 1911, p. 324), and by Act 169, of March 12, 1913 (Acts 1913, p. 724). Construed, in State ex rel. Norwood, Attorney General v. Kansas City & Memphis Ry. & Bridge Co., 106 Ark., 248; s. c. 153 S. W., 614; and in State ex rel. Moose, Attorney General v. K. C. & Memphis Ry. & Bridge Co., 117 Ark., 606; s. c., 174 S. W., 248.

be situated, in which suit or suits the corporation owing such taxes, or any corporation [or person] claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant, and the Governor is authorized to employ any attorneys that may be necessary to assist the Attorney General in such suits. *Provided, that this Act shall be construed as retrospective as well as prospective in operation.*

(Sec. 2.) That in all cases where the Governor has appointed or may hereafter appoint special counsel under Section 1 of this Act to assist the Attorney General in the collection of overdue taxes from corporations, such special counsel shall receive a reasonable compensation for his services, dependent upon recovery, and to be fixed by the chancery court trying said cause; but, in no case shall such counsel receive more than twenty per cent of the amount recovered.

Sec. 7205. If the Attorney-General shall certify on the complaint to be filed in said suit that he cannot find any one in the State upon whom service can be had so as to bind said corporation according to existing laws, the clerk shall enter a warning order against said corporation, requiring the defendant to appear in said cause on the first day of the next term of the court to answer said complaint, which warning order shall be published and proved as other warning orders are required to be published and proved by law, and with the like effect.

Sec. 7206. Said complaint shall describe as nearly as may be the property on which said taxes have accrued, and the State, counties, school districts and municipal corporations aforesaid shall have a lien on said property from passage of this Act, for the payment of said overdue taxes, to be enforced by suit as herein provided.

Sec. 7207. [1] On a final hearing the court shall determine the amount of said State, county, school district and municipal taxes, and the penalties and costs due on the same, if any, and to whom said taxes are payable, and shall decree payment thereof accordingly, and where for any reason the property on which said taxes may have accrued shall not have been assessed, the court shall refer the matter of such assessment to the assessor of the county in which said property may lie, who shall make his assessment for any past year or years mentioned in the order of reference, and shall return the same into court.

[2] And in case the property shall belong, or have belonged to any delinquent railroad company, the court shall in like manner refer the assessment of said property to the proper officer or board of officers or commissioners, whose duty it shall be, at the time of the making of said reference, to assess property of like kind, and they shall report their assessment to the court, and the court shall have power to hear testimony and to change said assessment as justice and equity may require.

Sec. 7208. [1] On such final hearing the court shall render a decree declaring and enforcing said lien for taxes, by sale of the property to which said taxes may have attached.

[2] In the case of a railroad, the lien shall be decreed against the whole line of the road, including the main line and side tracks, switches, turnouts, improvements, stations, structures, right-of-way, embankments, tunnels, cuts, ties, trestles and bridges, and all lands in the State belonging to such corporations.

[3] The court shall decree the said taxes shall be paid within three months after rendering

said decree, and that in default thereof said defendant shall pay a penalty of ten per centum on the amount of said taxes.

Sec. 7209. The sale of any property under said decree shall be made in the same manner as other sales are made under other decrees foreclosing liens in chancery, and with like effect, and the court shall distribute any fund accruing under this Act among the State, counties and municipal corporations and school districts entitled thereto by law.

Sec. 7210. All parties having any interest in any property sold under this Act, may redeem the same at any time within one year from the date of said sale, by paying into court the amount of said decree and penalty on the same at the rate of twenty-five per centum per annum.

Sec. 7211. In case no such redemption is made, the court shall cause a deed to be executed to said purchaser, conveying said property to him absolutely, and said deed shall have the same force and effect that are given by law to other deeds for property sold under decree in chancery.

Sec. 7212. Suits brought under this Act shall have precedence of all other suits in the courts in which they may be pending, and shall be disposed of without unnecessary delay, and no appeal from any decree rendered in any suit brought under this Act shall be taken after thirty days from the date of such decree.

Sec. 7213. The decree rendered in said suit shall be for all taxes due the State, and to the counties, cities and other political subdivisions of the State, and shall not be confined to the taxes due in the county in which the suit is brought.

FORT SMITH LUMBER COMPANY *v.* STATE OF ARKANSAS EX REL. ARBUCKLE, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 394. Submitted January 5, 1920.—Decided March 1, 1920.

Double taxation is not forbidden by the Fourteenth Amendment. P. 533.

A State may use its taxing power to carry out a policy respecting corporations. *Id.*

It may discriminate between local corporations and individuals by making the former liable to be taxed on shares held in other local corporations, themselves fully taxed, and to be sued for the back taxes, while leaving individuals free from such liabilities. *Id.*

211 S. W. Rep. 662, affirmed.

THE case is stated in the opinion.

Mr. Joseph M. Hill and *Mr. Henry L. Fitzhugh* for plaintiff in error.

Mr. John D. Arbuckle, Attorney General of the State of Arkansas, and *Mr. George Vaughan* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the State of Arkansas against the plaintiff in error, a corporation of the State, to recover back taxes alleged to be due upon a proper valuation of its capital stock. The corporation owned stock in two other corporations of the State each of which paid full taxes and it contended that it was entitled to omit the value of such stock from the valuation of its own. This omission is the matter in dispute. The corporation defends on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the Fourteenth Amendment. The case was heard on demurrer to the answer and agreed facts, and the statute levying the tax was sustained by the Supreme Court of the State.

The objection to the taxation as double may be laid on one side. That is a matter of state law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136, 137; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367, 368. We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them

in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.

The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See *New York State* v. *Barker*, 179 U. S. 279, 283. We have nothing to do with the supposed limitations upon the power of the state legislature in the constitution of the State. Those must be taken to be disposed of by the decisions of the State Court. As this case properly comes here by writ of error, an application for a writ of certiorari that was presented as a precaution will be denied.

Judgment affirmed.

MR. JUSTICE MCKENNA, MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.